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PETITION NOT PRINTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 186

LUIS ESTRADA MOYA, PETITIONER,

vs.

CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JUNE 9, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 186

LUIS ESTRADA MOYA, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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[fol. a]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendant

Clerk's Transcript for Appeal of Defendant Luis Estrada Moya

APPEARANCES:

For Plaintiff and Respondent: Roy A. Gustafson, District Attorney, Court House, Ventura, California. Stanley Mosk, State Attorney General, State Building, Los Angeles, California.

For Defendant and Appellant: Burt M. Henson, 65 South Palm Drive, Camarillo, California.

[fol. 1] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendant

INDICTMENT (Violation of § 187, Penal Code)—Filed December 26, 1958

The Grand Jury of the County of Ventura hereby accuses Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado of a felony, to-wit, a violation of Section 187 of the Penal Code in that on or about November 17, 1958 they murdered Olga Duncan.

Dated this 26th day of December, 1958.

A true bill.

George E. Ruggel, Foreman of the Grand Jury of the County of Ventura, State of California.

The following are the names of witnesses examined before the Grand Jury: Emma Short, Rudolph Romero, Diane [fol. 2] Romero, Barbara Reed, Mrs. Harold Barnett, Sylvia Butler, Doreen Corraini, Augustine Beldonado, Luis Estrada Moya, Gordon Johnston, M.D., Mrs. Mary Ann Dowhower, Frank Duncan, Hal Hammons, Jr., Clarence Henderson, Vigil Payton.

[fol. 3] IN SUPERIOR COURT OF VENTURA COUNTY

Tuesday, December 30, 1958. 9:30 O'Clock A. M.

Present: Hon. Chas. F. Blackstock, Judge of the Superior Court, County of Ventura, L. E. Hallowell, Clerk, By Wm. R. Peacock, Deputy, W. J. Spytar, Sheriff and Gladys Goodman and Cecil Van Vleck, Court Reporter.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendant

ARRAIGNMENT & APPOINTMENT OF COUNSEL

The District Attorney, defendant Elizabeth Ann Duncan, with her counsel, S. Ward Sullivan, and defendants Luis Estrada Moya and Augustine Baldonado, without attorneys, are present in Court.

Defendant Duncan is informed of her legal rights, waives reading of the indictment, a copy of which is delivered to her, and at her request cause is continued until Jan. 6, 1959, at 2:00 P.M. for plea.

Defendant Moya is advised of his legal rights, whereupon, at his request, the Court appoints and assigns Nagao Fujita as counsel for said defendant.

Defendant Baldonado is informed of his rights and at his request the Court appoints John Danch, who is present as attorney for Baldonado.

Cause as to Moya and Baldonado is thereupon continued until January 6, 1959, at 2:00 P.M. for further arraignment and plea.

[fol. 4] All defendants are remanded to the custody of the Sheriff.

2:35 O'Clock P. M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, et. al.

ORDER APPOINTING NEW COUNSEL

The District Attorney and defendant, with his counsel, Nagao Fujita, present.

Cause comes on for further proceedings at request of defendant's counsel.

At this time, on motion of defense counsel, and good cause appearing therefor, Mr. Fujita is allowed to withdraw as counsel for defendant and Burt M. Henson is appointed and assigned as attorney for defendant Luis Estrada Moya.

[fol. 5] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

CR No. 3220

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

BENCH WARRANT

The People of the State of California, to any Peace Officer of the State of California.

An order having been made on the 26th day of December, 1958, by the Superior Court of the State of California, in and for the County Ventura, that Luis Estrada Moya, be arrested because of alleged violation of Section 187 of the Penal Code of the State of California.

You are, Therefore, Commanded forthwith to arrest Luis Estrada Moya and bring him before said court on the 30th day of December, 1958, 9:30 A.M.

By order of the Court.

Given under my hand with the seal of said Superior Court affixed this 26th day of December, 1958.

L. E. Hallowell, Clerk, By Stanley Robertson, Deputy Clerk.

STATE OF CALIFORNIA,
County of Ventura, ss:

Return

I Certify that I received the above warrant on 6 Jan., 1959, and served the same by arresting the above named defendant —— thereon *at* in custody on —— 19 ——, and bringing —— into court on 6 Jan., 1959.

Wm. E. Hill, Sheriff, by Ray Higgins, Deputy Sheriff.

[fol. 6] IN SUPERIOR COURT OF VENTURA COUNTY

Tuesday, January 6, 1959. 9:30 O'Clock A.M.

PLEAS OF NOT GUILTY & NOT GUILTY BY REASON OF INSANITY, ORDER APPOINTING ALIENISTS, ETC.

The District Attorney, defendant Elizabeth Ann Duncan, with her counsel S. Ward Sullivan, defendant Luis Estrada Moya, with his attorney Burt Henson and defendant Augustine Baldonado, with his counsel John Danch, are present in Court.

The defendants are duly arraigned, state their true names to be as alleged in the Indictment on file herein, which is read and a copy thereof delivered to each defendant by the Clerk.

Thereupon, defendant Elizabeth Ann Duncan enters her plea of not guilty and not guilty by reason of insanity of the offense of violation of Section 187 of the Penal Code, as charged in the Indictment.

Pursuant to law, the Court appoints Doctors Louis R. Nash and Philip R. A. May, members of the staff of Camarillo State hospital to examine defendant as to her sanity and to report their findings to the Court.

[fol. 7] Cause as to defendants Moya and Baldonado is

continued until January 13, 1959, at 9:30 A.M. for plea at request of their respective counsel.

Defendant Duncan at this time moves the Court for a change of venue from Ventura County to another County in the State of California for the purpose of trial.

Said motion is by the Court denied, without prejudice.

With both defendant Duncan and her counsel waiving statutory time, said cause as to defendant Duncan is set down for jury trial on Monday, February 16, 1959, at 10:00 A.M. and the Sheriff is ordered to summon 250 prospective jurors to be in attendance upon the Court at said time.

All defendants are remanded to the custody of the Sheriff.

[fol. 8] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

[Title omitted]

NOTICE OF APPLICATION FOR REMOVAL OF ACTION P. C. 1033—Filed January 13, 1959

To the Honorable Roy A. Gustafson, District Attorney, County of Ventura:

You will please take notice that Defendant Luis Moya will make application for removal of action or motion for change of venue on Tuesday, January 13, 1959, at the hour of 9:30 A.M. or as soon thereafter as counsel can be heard in the courtroom of the above entitled court, Courthouse, Ventura, California.

Burt M. Henson, Attorney for Defendant Luis Moya.

I hereby acknowledge receipt of a copy of this notice, a copy of the application for removal, and copies of affidavits in support of application at 9:05 A.M., this 12th day of January, 1959

Bruce A. Thompson.

[fol. 9] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

[Title omitted]

APPLICATION FOR REMOVAL OF ACTION P. C. 1033—Filed January 13, 1959

Defendant Luis Moya, by and through his counsel, Burt M. Henson, hereby makes application to the above entitled Court for removal of the action or change of venue in the above entitled action on the ground that a fair and impartial trial cannot be had in the County of Ventura, State of California.

This application is made under the provisions of Sections 1033 and 1034 of the Penal Code of the State of California.

This application is made upon the affidavits attached hereto and upon all the records, papers and files in said action.

Dated: January 10, 1959.

Burt M. Henson, Attorney for Defendant Luis Moya.

[fol. 10] [File endorsement omitted]

AFFIDAVIT OF LUIS MOYA IN SUPPORT OF APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

Luis Moya, being first duly sworn, deposes and states that:

I am a defendant in an action entitled The People of the State of California vs. Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado, now pending in the Superior Court of the State of California in and for the County of Ventura.

I have been incarcerated since on or before December 10, 1958, in the County Jails of Santa Barbara and Ventura Counties. I have not been in communication with persons

other than those who have visited me in an official capacity and occasional visits by friends. I have had no opportunity to acquire any personal knowledge of whether or not I will receive a fair and impartial trial in the County of Ventura.

By this affidavit I am attempting to comply with the requirements of Section 1034 of the Penal Code. Based upon information given me by my attorney, I believe and therefore allege that I will not be able to have a fair and impartial trial in the County of Ventura and hereby join in the application for removal prepared and filed by my attorney.

Luis Moya.

Subscribed and sworn to before me this 10th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 11] AFFIDAVIT OF FLOYD K. GRESSETT IN SUPPORT OF APPLICATION

STATE OF CALIFORNIA
County of Ventura, ss:

Floyd K. Gressett, being first duly sworn, deposes and says that:

I am the duly appointed and acting Minister for the Avenue Community Church located in the City of Ventura, County of Ventura, California;

Since the incarceration of Luis Moya and the charge filed against him for the death of Olga Duncan, I have served as the spiritual adviser and minister to Luis Moya who first expressed the desire that he be allowed to consult with me.

It is known among my congregation and other acquaintances of mine, that I am acting as a minister to defendant Luis Moya. Consequently, people in my congregation and other residents of Ventura County have discussed the case with me and have expressed sentiments suggesting that they were prejudiced against the defendants in this case as a result of the notoriety given the case by newspapers and by certain public officials charged with the investigation and prosecution of the case. Others have expressed the

sentiment that those accused would not receive a fair and impartial trial because of the wide notoriety given in the newspapers and statements by public officials charged with the prosecution and investigation.

Floyd K. Gressett.

Subscribed and sworn to before me this 10th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 12] AFFIDAVIT OF WILLIAM A. GILBERT IN SUPPORT OF APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

I, William A. Gilbert, being first duly sworn, depose and say that:

I am the duly appointed and acting Rector of St. Paul's Episcopal Church, Ventura, California, and have been acting in that capacity for 8½ years. At one time in my life, I served as Chaplain to Washington State Prison at Walla Walla, Washington. I have made public my personal views about abolition of the death penalty on many occasions.

Since my personal views on the abolition of capital punishment and my experience as a prison chaplain are widely known in the Ventura County area, many people have talked to me concerning that subject. Since the inception of the case involving the death of Olga Duncan, many persons who are residents of Ventura County have expressed their opinions to me concerning the case. Some of the persons with whom I have talked concerning the case have expressed the opinion that they had prejudged the case and that there was no question in their minds but that those charged with the death of Olga Duncan should be sentenced to death. Many of these residents of Ventura County have stated to me that there is no need of any trial or court process in this case because of the overwhelming evidence as reported by newspapers and public officials connected with the investigation of the Duncan case. Many

other residents of Ventura County with whom I have discussed the Duncan case, have stated to me that the vast notoriety given this case by public officials and by newspapers had prejudiced the right of the accused to a fair and impartial trial in Ventura County.

William A. Gilbert.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 13] DECLARATION OF DONALD L. BENTON IN SUPPORT OF APPLICATION

DECLARATION

I, Donald L. Benton, make the following declaration:

I am an attorney at law, admitted to practice in the State of California, and a resident of the City of San Buenaventura, County of Ventura, State of California.

Within the scope of my rather extensive non-legal acquaintance, the matter of People vs. Duncan, Baldonado and Moya is the most widely discussed criminal case in Ventura County since January 1, 1951. I have been drawn into a discussion of the case at all social functions I have attended since the case's inception. I have heard it discussed at service club meetings, directors' meetings, luncheon meetings, etc.

At no time have I observed any reluctance on the part of anyone discussing the case to state that the defendants are guilty. I have heard innumerable statements that the defendants should be executed. I have never heard any person state that he or she did not yet have an opinion regarding the guilt of the accused.

At various times I have pointed out that such opinions are founded on newspaper releases issued by law enforcement agencies, which were not necessarily accurate or complete. Persons so accused have admitted the truth of the charge, but have in substance stated that "They better not let me on the jury—I'd hang them."

I have further pointed out to persons expressing such opinions that this case, particularly with the news release regarding the death penalty which was issued before the Duncan indictment, is an example of the evils of trying a case in the newspapers. The logic of my argument was conceded, but at no time was I able to persuade anyone to change his or her opinion, or even to withhold judgment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 4th, 1959, at Ventura, California.

Donald Benton.

[fol. 14] AFFIDAVIT OF DAVID E. FLYNN IN SUPPORT OF APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

David E. Flynn, being first duly sworn, deposes and says:

I live at 275 E. Highland Drive, Camarillo, County of Ventura, California;

Prior to January 5, 1959, I was the duly elected Judge of the Justice Court of the Moorpark-Camarillo Judicial District, County of Ventura, California;

On or about January 4, 1959, a very dear friend of mine and a resident of the County of Ventura came to my home at 275 E. Highland Drive, Camarillo, and discussed with me the pending charges against Elizabeth Duncan, Luis Moya and Augustine Baldonado. He stated to me in substance that everyone connected with that case should be summarily exterminated. He expressed dissatisfaction with the fact that the accused should be given the benefit of court process. He stated that he could not understand why an attorney would represent one of the accused. He further stated that he was intending to consult one of defense counsel as a private attorney, but would not do so since that particular attorney was acting as defense counsel in this case.

I stated to this man that with my background as a Judge of the Justice Court, I felt that everyone was entitled to the processes of the court and to a fair and impartial trial no matter who they were or what they were charged with.

I further stated that all persons were entitled to counsel and that when counsel is appointed by the court, he is obligated to serve as defense counsel unless he has some good valid reason for not doing so. I pointed out to him that the defense counsel now appointed apparently had no valid reason for declining acceptance of the appointment and that therefore he was obligated to serve. I stated that anything less than this American tradition of a fair and impartial trial would be the "lynch law".

[fol. 15] This man then stated to me that the "lynch law" should be applied in this case and that defense counsel should withdraw from the case. He stated that it would "hurt" one particular defense counsel in his law practice if he continued to serve as defense counsel. This man further stated that he had talked to twelve other persons in the Oxnard-Camarillo area and that each of the twelve other persons felt exactly the same way he did about the case.

David E. Flynn.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 16] AFFIDAVIT OF ALBERT T. BLANFORD IN SUPPORT OF APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

Albert T. Blanford, being first duly sworn, deposes and says that:

I am a resident of the City of Ventura, County of Ventura, State of California;

I am an Attorney at Law licensed by the State of California and maintain an office for the purpose of practicing law at 2408 East Main Street, Ventura, California. The fact that I am an attorney is known among my friends and acquaintances.

Since the commencement of the investigation involving the death of Olga Duncan, many of my friends and ac-

quaintances who are residents of Ventura County have discussed this case with me. Practically all who have discussed the Duncan case with me have expressed one or the other of the following opinions:

1. That those accused of causing the death of Olga Duncan were guilty and should be sentenced to death.
2. That the widespread notoriety given this case by newspapers, plus the statements of public officials charged with the investigation of this case, have prejudiced the right of the accused to a fair and impartial trial.

Albert T. Blanford.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 17] AFFIDAVIT OF DAVID R. DRAPEAU IN SUPPORT OF APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

David R. Drapeau, being first duly sworn, deposes and states that:

I am a resident o fthe City of Ventura, County of Ventura, State of California. I am an Attorney at Law licensed to practice by the State of California, and maintain an office for the purpose of practicing law at 736 East Main Street, Ventura, California. The fact that I am an attorney is known among my friends and acquaintances.

Since the commencement of the investigation involving the death of Olga Duncan, many of my friends and acquaintances who are residents of Ventura County have discussed this case with me. Practically all who have discussed the Duncan case with me have expressed one or the other of the following opinions:

1. That those accused of causing the death of Olga Duncan were guilty and should be sentenced to death.
2. That the widespread notoriety given this case by

newspapers, plus the statements of public officials charged with the investigation of this case, have prejudiced the right of the accused to a fair and impartial trial.

David R. Drapeau.

Subscribed and sworn to before me this 9th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 18] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA

AFFIDAVIT IN SUPPORT OF APPLICATION FOR REMOVAL OF ACTION

Burt M. Henson, being first duly sworn, deposes and states as follows:

I am an Attorney at Law licensed to practice law in the State of California and maintain an office for the purpose of practicing law at 65 South Palm Drive, Camarillo, California. Prior to January 1, 1958, I served in the office of the District Attorney of Ventura County as a Deputy District Attorney. My duties as Deputy District Attorney primarily involved the investigation and prosecution of criminal cases as distinguished from civil cases. This experience was known by my personal friends and acquaintances.

The case involving the alleged disappearance and death of Olga Duncan and the case involving an alleged fraudulent annulment obtained by Elizabeth Duncan first came to my attention through newspaper articles, television and radio broadcasts. Almost immediately from the time these [fol. 19] cases became public, they have become conversation pieces". Practically all of my personal friends, family and acquaintances discussed this case with me. Practically all the residents of the County of Ventura who discussed this case with me expressed some opinion based upon newspaper and television and radio reports and based upon statements made by public officials charged with the

investigation and prosecution of the case. The vast majority of opinions expressed were in substance that those accused were guilty and should be summarily executed, that this was the worst case imaginable, that the accused were nothing more than animals and should be disposed of accordingly.

In conversations with my friends and acquaintances, the accused were referred to as "Dirty Bastards", "Lousy Sons of Bitches" and other vile epithets. Other opinions expressed were in substance that any prospective jurors would be prejudiced as a result of the wide notoriety given this case and as a result of the statements of public officials involved in the investigation and prosecution of the case. Only one man who is eligible for jury duty with whom I talked expressed the opinion that he would endeavor to keep an open mind on the case but stated "I hope I am not called upon for jury duty in this case".

On or about December 30, 1958, in the late afternoon, I was notified by the Clerk of the Superior Court that I had been appointed by Judge Blackstock to represent Luis Moya in the action. After coming home from work, I informed my family of the appointment. My eleven year old step-daughter stated: "What are you doing to do that for? That's no case". After the fact of my appointment to represent Luis Moya became public, many of my friends and acquaintances joked with me about it and one friend jokingly stated: "How lucky can you get!"

[fol. 20] On or about January 6, 1959, I appeared in the Courtroom of the above entitled court. The purpose of the appearance was for the arraignment of the above named defendants. The time set for the arraignment was 2 P.M. I arrived at the courthouse at approximately 1:15 P.M. for the purpose of conferring with defendant Luis Moya before the arraignment. At 1:15 P.M., all of the spectator seats in the courtroom were filled and other spectators were standing to the rear of the courtroom. I conferred with defendant Luis Moya in the Ventura County Jail which is located on the second floor on the west end of the courthouse. After conferring with Luis Moya for approximately 20 minutes, I proceeded toward the courtroom which is located in the middle of the courthouse on the second floor. The hallway which lead from

the jail to the courtroom wherein the arraignment proceedings were scheduled is approximately 15 to 20 feet wide near the entrance to the courtroom. The hallway at the entrance to the courtroom was blocked by spectators and another attorney and myself were forced to shoulder our way through the spectator crowd.

[redacted] to gain entrance to the courtroom through a side door which leads into the Judge's Chambers. The courtroom was filled to capacity including all standing room in the spectator section. Attached hereto as Exhibit 1 is the January 7, 1959 issue of the Oxnard Press Courier which contains a photograph of the condition of the courtroom at the time of the arraignment. The number of persons comprising the crowd was estimated to be 1000 as reported in the January 7, 1959 issue of the Los Angeles Times, a copy of which is attached hereto as Exhibit 2. Exhibit 2 termed the crowd as "hostile" and reported that "a middle aged woman aimed a smashing blow at her (defendant Elizabeth Duncan) with her purse."
[fol. 21] At the time of the arraignment, Counsel for defendant Elizabeth Duncan entered a plea of not guilty by reason of insanity. At this point, the spectator crowd uttered a distinctly audible "Ohhhh". The court set the trial for defendant Elizabeth Duncan on February 16, 1959 at 10 A.M. based upon the representation of the District Attorney that a trial must be had within a thirty day period following return of the indictment. Defendant Elizabeth Duncan waived time for trial within the represented 30 day period.

The Court then inquired of affiant as counsel for defendant Luis Moya whether or not February 16, 1959 was agreeable for a joint trial of all defendants. Affiant objected to the early trial date in view of the prejudice against the defendants displayed by the courtroom spectators. When affiant suggested that the trial be set for the middle of March, the spectator crowd in the courtroom again uttered a distinctly audible "Ohhhh".

Affiant believes and thereon alleges that there is widespread and deep-seated prejudice against the defendants in the above entitled case. Affiant believes and thereon alleges that a primary reason for the existing prejudice is the fact that certain public officials made certain public statements

concerning the above entitled case. Some high ranking public officials publicly expressed their opinions concerning the case. Other public officers released information to the press and other public media concerning the investigation. Many of such statements were made before any legal tribunal had heard any evidence. Many of such statements divulged information which would not have in any way constituted legal evidence in a trial. The statements of opinion published would probably have been classified as "prejudicial misconduct" if stated in a court of law. Affiant does not doubt the personal sincerity of these public officers. Affiant believes these public officers to be men of personal integrity and honesty. Affiant, however, does believe and thereon alleges that these public officers be-
[fol. 22] came "carried away" and clearly overstepped the bounds of legal propriety and discretion in making such public statements and in so doing, contributed materially to the prejudice against the defendants which now exists.

Roy A. Gustafson is the duly elected and acting District Attorney for the County of Ventura. He has served in that capacity for approximately 8 years and is well informed as to his duties and responsibilities with respect to the public office he holds.

In the December 22, 1958 issue of the Ventura County Star-Free Press, a copy of which is attached hereto as Exhibit 3, Roy A. Gustafson caused to be published a statement which contained among other matters, the following:

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime . . . Retaliation is a basic instinct of the human race . . . From biblical times, a life for a life has been recognized as just and fair."

The statement is printed in full on Page 1 Exhibit 3. The same statement in full appeared in the December 24, 1958 issue of the Oxnard Press Courier on page 15, a copy of said issue is attached hereto as Exhibit 4.

These statements were published before the case was

even presented to the Grand Jury of Ventura County for consideration. The District Attorney is legal counsel for the Grand Jury and Roy A. Gustafson presented the facts of the above entitled case to the Grand Jury for consideration on December 26, 1958. As reported in the December 27, 1958 issue of the Ventura County Star-Free Press, the Grand Jury returned indictments against the above named defendants after deliberating only 15 minutes. A copy of [fol. 23] the December 27, 1958 issue of the Ventura County Star-Free Press is attached hereto and made a part hereof as Exhibit 5. As reported in the December 27, 1958 issue of the Oxnard—Press Courier, a copy of which is attached hereto as Exhibit 6, the Grand Jury deliberated only 12 minutes before returning an indictment for murder against all three of the above named defendants. The December 27, 1958 issue of the Los Angeles Times, a copy of which is attached hereto as Exhibit 7 estimated the time for Grand Jury deliberation at 15 minutes. Affiant believes that 12 to 15 minutes deliberation by a Grand Jury considering 9 hours of testimony and 3 defendants is a very short time. Affiant believes that this fact illustrates the effect of the statements of the District Attorney.

Affiant is informed and believes and thereon alleges that in an earlier Edition of the December 27, 1958 issue of the Ventura County Star-Free Press, there was published a statement by Roy A. Gustafson, referring to the above entitled case as follows:

"This crime," he (Gustafson) declared, "is one of the most vicious and horrible in the annals of modern justice. Each new fact uncovered throughout the investigation has been more disgusting and shocking than the last.

"It should serve as an object lesson to all persons who find it necessary to extend a gratuitous and wasted sympathy toward murderers—asking that they be spared their lives.

"Nothing short of death could possibly be considered a just or a fitting penalty for the perpetrators of this crime against an innocent young mother-to-be."

In the December 30, 1958 issue of the Ventura County Star Free Press, a copy of which is attached hereto as Exhibit 8, on page 6, the following headlines were published.

"'Roy Gustafson Explains Why He'll Ask Death Penalty for Duncan Murder Trio"

[fol. 24] In the article following the headline, Roy A. Gustafson, apparently being interviewed by reporter Marvin Sosna, stated that "the chances of rehabilitating the three persons arraigned today on a charge of murder for hire are awfully slim . . . and I don't want to take that kind of chance." The article goes on as follows: "But he (Gustafson) believes that the Duncan case and torture-sex slayings attributed to confessed killer Harvey Glatman in San Diego County will deter a number of legislators from voting for abolition (of the death penalty) during the coming legislative session." In discussing rehabilitation further, the article states: "But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a 1-to-10 year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case." The article further states: "He (Gustafson) commented that the possibility of putting California's third woman in the gas chamber does not present him (Gustafson) with any qualms. 'This is appropriate punishment', he said, paraphrasing the judge in the Harvey Glatman case. And he adds: 'What are you going to do, rehabilitate 'em.'"

In the December 29, 1959 issue of the Ventura County Star Free Press, copy of which is attached hereto as Exhibit 9, the following headline appears on Page 1: "Heart Attack Sends Mrs. Duncan to Hospital". In the article following the headline, the following appears: "District Attorney Roy A. Gustafson this morning said that Mrs. Duncan's illness may have been real but added that: 'This is a trick used by many persons in jail on a serious charge. It is known that suspects fake illnesses to get into a hospital where there is a chance for escape.'"

Other public officers saw fit to express their opinions on the case. In the December 22, 1958 issue of the Los Angeles Herald Express, a copy of which is attached hereto as Exhibit 10, referring to the above entitled case, the follow-[fol. 25] ing was reported on Page 1: "The execution of the $6000 slaying was called by Santa Barbara Police Lieut. Charles Thompson, 'the most cold-blooded crime I've ever

heard of. We knew from the first there was something strange about this case.' "

In the December 15, 1958 issue of the Ventura County Star Free Press, a copy of which is attached hereto as Exhibit 11, referring to the disappearance of Olga Duncan and arrest of Elizabeth Duncan, on Page 1, the following appeared: "But there were indications of more serious charges. Said Woodruff J. Deam, chief criminal deputy of the district attorney's office: 'When we have a suspected murder case, we don't give hints.' "

Apparently the attitude expressed by Mr. Deem was not shared by his fellow law enforcement officials connected with the investigation. Not only were "hints" given out thereafter, but more so, a play by play description of every detailed phase of the investigation. The matters reported by the newspapers were of a nature which must necessarily have come from law enforcement officers. Throughout the reports published were various law enforcement officers statements concerning every new development in the case. The information revealed was so complete and detailed that affiant believes for all practical purposes, the case has been tried. The names of the officers giving out information and the information published are set forth in full in the following copies of the following issues of the Ventura County Star-Free Press, which are attached hereto and numbered accordingly:

December 16, 1958—Exhibit 11-A
December 17, 1958—Exhibit 12
December 18, 1958—Exhibit 13
December 19, 1958—Exhibit 14
December 20, 1958—Exhibit 15
December 23, 1958—Exhibit 16
December 24, 1958—Exhibit 17
[fol. 26] December 26, 1958—Exhibit 18
December 31, 1958—Exhibit 19

The Ventura County Star Free Press has the largest circulation (22,000) of any other newspaper published in Ventura County. It and the Oxnard Press Courier are the only two daily newspapers published in the County of Ventura. The Oxnard Press Courier is a newspaper of general circulation and advertises itself as the official

newspaper of the City of Oxnard. The City of Oxnard is the largest city in the County of Ventura with a population of approximately 35,000. Practically the same facts concerning the investigation of the above entitled case were published in the Oxnard Press Courier. The following issues of the Oxnard Press Courier are attached hereto as the following numbered exhibits:

December 16, 1958—Exhibit 20
December 17, 1958—Exhibit 21
December 19, 1958—Exhibit 22
December 20, 1958—Exhibit 23
December 22, 1958—Exhibit 24
December 23, 1958—Exhibit 25
December 26, 1958—Exhibit 26
December 29, 1958—Exhibit 27
December 31, 1958—Exhibit 28

In subsequent issues of both the Ventura County Star Free Press and the Oxnard Press Courier, there were published practically the whole of the recorded transcript of the testimony taken before the Grand Jury which returned the indictment in the above entitled case. The recorded transcript appeared as daily installments with verbatum passages of Grand Jury testimony published. A typical example are the passages published in the December 31, 1958 issue of the Oxnard Press Courier attached hereto as Exhibit 28.

Affiant is informed and believes and thereon alleges that the Los Angeles Times is the newspaper of largest circula-
[fol. 27] tion in Southern California. It is published in the County of Los Angeles but is widely circulated and read in the County of Ventura. Attached hereto as Exhibits are the copies of the following issues:

December 16, 1958—Exhibit 29
December 22, 1958—Exhibit 30
December 23, 1958—Exhibit 31
December 31, 1958—Exhibit 32

The Los Angeles News Herald is a newspaper of general circulation and is published in the County of Los Angeles but which is widely circulated and read in the County of

Ventura. Attached hereto as Exhibits are the following copies of issues:

December 15, 1958—Exhibit 33
December 26, 1958—Exhibit 34
December 30, 1958—Exhibit 35

The above exhibits are to illustrate the widespread notoriety given the above entitled case, the type of information released to newspapers by law enforcement officers, the release of the Grand Jury transcript for publication, the information published which would not even constitute evidence in the case, and the prejudice which must necessarily have resulted from such publications.

The above entitled case has also been discussed and commented upon by practically every radio and television newscaster in the Los Angeles-Ventura County area. The broadcasts which affiant has heard was in substance the same as that reported in the newspapers attached hereto as exhibits.

Defendant Luis Moya is of Spanish-Mexican descent. During affiant's residence in the County of Ventura for the past four years, he has heard various comments from time to time from residents of Ventura County indicating prejudice toward certain persons of Spanish-Mexican descent.

[fol. 28] Burt M. Henson.

Subscribed and sworn to before me this 10th day of January, 1959.

B. S. Kulheer, Notary Public in and for the County of Ventura, State of California.

[fol. 28a] AFFIDAVIT OF JACK R. McHENRY IN OPPOSITION TO APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

Jack R. McHenry, being first duly sworn, deposes and says that:

I am the managing editor of the Ventura County Star-Free Press, a newspaper published in the City of Ventura, California.

I have examined the issues of the Ventura County Star-Free Press from December 20, 1958, to date and I can find no story, article or editorial quoting Roy A. Gustafson, District Attorney of the County of Ventura, as follows:

> "This crime," he declared, "is one of the most vicious and horrible in the annals of modern justice. Each new fact uncovered throughout the investigation has been more disgusting and shocking than the last.
>
> "It should serve as an object lesson to all persons who find it necessary to extend a gratuitous and wasted sympathy toward murderers—asking that they be spared their lives.
>
> "Nothing short of death could possibly be considered a just or a fitting penalty for the perpetrators of this crime against an innocent young mother-to-be."

Roy A. Gustafson did not make any such statement to me and I have no knowledge, information or belief that he made any such statement to anyone.

Jack R. McHenry.

Subscribed and sworn to before me this 12th day of January, 1959.

Harold J. Kelly.

Notary Public in and for said County and State.

My commission expires June 28, 1962.

[fol. 28b] AFFIDAVIT OF ROY A. GUSTAFSON IN OPPOSITION TO APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

Roy A. Gustafson, being by me first duly sworn, deposes and says that:

I am the District Attorney of Ventura County. On or about December 21, 1958, I publicly made the following statement:

> "The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime.
>
> "Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course penalties do not completely deter crimes. Jail sentences do not completely deter drunken drivers, burglars, robbers or any other criminals and death penalties do not completely deter murderers. But that is no reason to dispense with penalties.
>
> "Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrongdoer. From biblical times, a life for a life has been recognized as just and fair.
>
> "The alternative in California, a life sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda drivel that has flooded us lately about the so-called evils of capital [fol. 28c] punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."

In that statement no mention was made of the defendants in the case of *People* v. *Elizabeth Duncan, et al.* I have never publicly declared my personal knowledge or

belief of the guilt of the defendants or any of them. No statement ever made by me was calculated to arouse public passion and prejudice against the defendants or any of them.

Neither the following statement, nor anything resembling it, was ever made by me at any time:

> "This crime," he declared, "is one of the most vicious and horrible in the annals of modern justice. Each new fact uncovered throughout the investigation has been more disgusting and shocking than the last.
>
> "It should serve as an object lesson to all persons who find it necessary to extend a gratuitous and wasted sympathy toward murderers—asking that they be spared their lives.
>
> "Nothing short of death could possibly be considered a just or a fitting penalty for the perpetrators of this crime against an innocent young mother-to-be."

To the best of my information and belief, the publications concerning this case have not aroused public passion and prejudice against the defendants, or any of them, to the extent that a fair and impartial jury to try the defendants cannot be obtained in Ventura County.

Roy A. Gustafson

Subscribed and Sworn to before me this 12th day of January, 1959.

Franklin R. Greene, Notary Public in and for said County and State.

My Commission Expires February 23, 1959.

[fol. 28d] AFFIDAVIT OF VOLNEY CUMMINS IN OPPOSITION TO APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

Volney Cummins, being by me first duly sworn, deposes and says that:

I am the Undersheriff of Ventura County. I was present in the court room on January 6, 1959, when the defendants, Duncan, Baldinado and Moya were in court.

I am familiar with the seating capacity of the court room and I have had experience in estimating the size of crowds of persons. I estimate that the number of persons seated and standing in the court room together with the number of persons who were standing in the hall unable to gain admittance to the court room did not exceed two hundred (200). The population of Ventura County is approximately 170,000.

I heard the report that a woman attempted to hit defendant Elizabeth Duncan with a purse. I made numerous inquiries of officers, newspapermen, spectators and others in an attempt to verify this report. The only person whose name was given to me as one who had reportedly seen the incident was William Lewis, investigator for S. Ward Sullivan, Attorney for the defendant Elizabeth Duncan.

Volney Cummins.

Subscribed and sworn to before me this 13th day of January, 1959.

Maxine E. Coutre, Notary Public in and for said County and State.

My Commission Expires August 10, 1962

[fol. 28e] AFFIDAVIT OF ROY A. GUSTAFSON IN OPPOSITION TO APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

Roy A. Gustafson, being by me first duly sworn, deposes and says that:

I have examined the affidavits attached to the applications for removal of the case of *People* v. *Elizabeth Ann Duncan, et al.* Not a single affidavit appears from any person stating that the declarant is biased and prejudiced against the defendants, or any of them, or that the declarant believes that the defendants, or any of them, are guilty or that the declarant believes that the defendants, or any of them, should be executed. Moreover, in none of the affidavits does the declarant identify by name any person who made any statement regarding the defendants.

I am not aware of any person in Ventura County who has stated that he could not act fairly and impartially as a juror in the trial of the defendants, or any of them.

It is a matter of common knowledge that newspapers and other media of communication publish reports about crimes that have occurred which are of interest to the public. I know of no rule of law which prohibits any law enforcement officer from disclosing facts to the media of communication. I know of no rule of law which imposes any censorship on media of communication with respect to publishing facts about a crime.

When the transcript of the Grand Jury hearing was filed with the Clerk of the Superior Court, the testimony of the witnesses before the Grand Jury became a matter of public record. There is no rule of law precluding the public from learning from the transcript what transpired before the Grand Jury. I have examined the exhibits attached to the affidavits filed with the applications for change of place of trial and can find nothing in the newspaper [fol. 28f] reports published prior to the filing of the Grand Jury transcript which related the facts in nearly as great detail as they are related in the transcript of the Grand Jury hearing. It is obvious that had not one fact been disclosed by any law enforcement officer prior to the filing

of the Grand Jury transcript, the attitude of the publi after the filing of the Grand Jury transcript would hav been the same as it now is.

I do not know of my own knowledge the exact lengt of time that the Grand Jury deliberated before returnin an indictment against the defendants, but assuming tha it was fifteen minutes, I know of no rule of law whic requires that the Grand Jury deliberate any particula length of time before returning an indictment. On th contrary, I am familiar with the case of *People* v. *Daugher* (1953), 40 Cal. 2d 876 where the defendant, appealing fro a verdict of a trial jury imposing a death penalty fo murder, claimed "that the jury reached a verdict in s short a time that it must have been prejudiced". Th Supreme Court of California said that

> "it may be noted that the jury took an hour and quarter to reach its verdict on the first phase of th trial. While the record consists of some 1,274 page the defendant's only defense at the trial was, as abov stated, that the defendant was so befuddled by alcoho and illness that he could not form an intent and wa incapable of premeditation or deliberation. There wa no question that defendant killed Florena and the evi dence of torture and premeditation and that his min was not so affected is adequate. Inasmuch, however as there were no eyewitnesses to the killing, most o the record consists of the People's structure of a cas based on circumstantial evidence. On the record we d [fol. 28g] not believe the time consumed in reaching th verdict was so short as to indicate a failure to con sider the evidence or of bias or prejudice or the denia of a fair trial."

The transcript before the Grand Jury was less tha one-fifth as long as the transcript in the case of *People* v *Daugherty*. Moreover, the Grand Jury had merely to de termine whether the defendants should be tried in the Su perior Court for murder and not whether they were guilt or whether, if guilty, they should suffer the death penalty I cannot remember any case during the time that I hav been District Attorney where the Grand Jury deliberate

any longer between the time of the conclusion of the evidence and returning the indictment than the Grand Jury did in the present case.

The fact that newspapers and other media of communication are entitled to publish facts about a crime and the fact that members of the public may form or express opinions about the guilt of defendants are expressly recognized in the law of California. Section 1076 of the Penal Code provides that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; *provided*, it appeared to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him." I have no information indicating that it will be impossible to find twelve persons in Ventura County who, despite any opinions they may have formed from reading the newspapers, can and will act impartially and fairly upon the matters to be submitted to them as jurors in this case.

My statement concerning the desirability of retaining the death penalty in California is simply the opposite point [fol. 28h] of view of the "widely known" opinion of William A. Gilbert referred to in his affidavit. I know of no rule of law which prohibits William A. Gilbert from urging the abolition of the death penalty or which prohibits me from urging the retention of the death penalty.

My statement that the death penalty is appropriate for the perpetrators of the murder of Olga Duncan cannot prejudice the defendants. The law of California is such that the defendants are guaranteed a fair trial. If, after such a trial, the defendants are found not to have perpetrated the crime, they obviously will not be prejudiced and my statement would be inapplicable to them. If, on the other hand, they are found guilty of first degree murder, then the statement will apply to them. The fact that it was made before the taking of testimony before the trial jury is of no consequence. In any case involving murder where the prosecutor seeks the death penalty, the fact that

he will do so is always disclosed before the trial jury is selected by reason of the questions asked of prospective jurors as to the entertainment of such conscientious opinions as would preclude their finding the defendant guilty and imposing the death penalty. Consequently, whether prospective jurors know that I will seek the death penalty as the appropriate punishment from reading the newspapers or from hearing me say so in court is immaterial.

I again deny, as I have already done in another affidavit, that I made any such statement as is attributed to me on page six of the affidavit of Burt Henson.

The affidavit of Burt Henson further states that "he has heard various comments from time to time from residents of Ventura County indicating prejudice toward certain persons of Spanish-Mexican descent." During my eight years as District Attorney, I have heard no such comments. I represent that hundreds of Mexicans have been tried by judges and juries in Ventura County and I [fol. 28i] am aware of not a single case wherein any court has ever held that any such person did not receive a fair trial because he was a Mexican. Persons of Mexican descent constantly serve as jurors in Ventura County. Based on my experience, jurors of Ventura County are extremely conscientious and do not permit the race, sex, origin nationality, religion, or color of a defendant to influence their verdicts.

I admit that I represented to the court that a trial of this case should be had within a thirty (30) day period following the return of the indictment and I based that representation upon section 1050 of the Penal Code which states that the "court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea of the defendant." I also admit that I represented to the court that my client, the People of the State of California, is entitled to an early trial and I based that statement on section 681a of the Penal Code which states: "The welfare of the People of the State of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and deter-

mination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice."

Roy A. Gustafson, District Attorney, County of Ventura, State of California.

Subscribed and sworn to before me this 13th day of January, 1959.

Maxine E. Coutre, Notary Public in and for said County and State.

My Commission Expires August 10, 1962.

[fol. 28j] AFFIDAVIT OF ROY A. GUSTAFSON IN OPPOSITION TO APPLICATION

AFFIDAVIT

STATE OF CALIFORNIA,
County of Ventura, ss:

Roy A. Gustafson, being by me first duly sworn, deposes and says that:

On Page 7 of the affidavit of Burt M. Henson appears the statement that a newspaper article said: "Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case." While the newspaper article was correctly quoted in the affidavit of Burt M. Henson, I made no such statement to anyone.

On the day following the publication of the article referred to, the same newspaper, the Ventura County Star-Free Press, published a statement saying that the earlier article was in error and that I had not made such a statement.

As far as I am aware, Moya was not using marijuana at the time he was arrested or at any time since 1956.

Roy A. Gustafson, District Attorney, County of Ventura, State of California.

Subscribed and sworn to before me this 13th day of January, 1959.

Maxine E. Coutre, Notary Public in and for said County and State.

My Commission Expires August 10, 1962.

[fol. 28k] AFFIDAVIT OF JACK R. MCHENRY IN OPPOSITION TO APPLICATION

STATE OF CALIFORNIA,
County of Ventura, ss:

Jack R. McHenry, being first duly sworn, deposes and says that:

I am the Managing Editor of the Ventura County Star-Free Press, a newspaper published in the City of Ventura, California.

On December 22, 1958, the Ventura County Star-Free Press published in full the statement of District Attorney Roy A. Gustafson made the previous day calling for the retention of the death penalty in California.

No letters have been received to date by the Ventura County Star-Free Press agreeing with the statement made by District Attorney Gustafson. Several letters were received disagreeing with the statement of District Attorney Gustafson and three of those letters were published. Exhibit A, attached hereto and made a part hereof, sets forth these letters as published by the newspaper and the dates on which they were published.

Jack R. McHenry.

Subscribed and Sworn to before me this 9th day of January, 1959.

Harold J. Kelly, Notary Public in and for said County and State.

My Commission Expires June 28, 1962.

[fol. 28l] NOTE RE EXHIBIT "A"

Page 28 L consisting of 3 "letters to the Editor" of The Star-Free Press are contained in the Original—but missing in this copy. (Copies can be seen in People vs. Duncan, pages 18-21.)

[fol. 29]. In Superior Court of Ventura County

Tuesday, January 13, 1959. 9:30 O'Clock, A.M.

Pleas of Not Guilty & Not Guilty by Reason of Insanity; Order Appointing Alienists; and Order Setting Cause for Trial

The District Attorney, defendant Luis Estrada Moya, with his counsel, Burt Henson, and defendant Augustine Baldonado, with his counsel, John Danch, present.

Cause comes regularly on at this time for receiving the plea of said defendants.

Thereupon, defendant Luis Estrada Moya enters the pleas of not guilty and not guilty by reason of insanity of the offense of Violation of Section 187 of the Penal Code, as charged in the indictment.

Pursuant to law, the Court appoints Doctors Louis R. Nash, David R. M. Harvey and Donald S. Patterson as Alienists to examine said defendant as to his sanity and to report their findings to the Court.

Defendant Augustine Baldonado regularly enters his pleas of not guilty and not guilty by reason of insanity of the offense of violation of Section 187 of the Penal Code, as charged in the indictment; and pursuant to stipulation, [fol. 30] Doctors Nash, Harvey and Patterson are appointed as alienists to examine defendant Baldonado as to his sanity.

Jury trial as to both defendants is thereafter set down for Monday, February 16, 1959, at 10:00 A.M., motions by defense counsel for a later trial date being by the Court denied.

Defendants are remanded.

[fol. 31] IN SUPERIOR COURT OF VENTURA COUNTY

Tuesday, January 13, 1959. 9:30 O'Clock, A.M.

MOTIONS FOR CHANGE OF VENUE

The District Attorney, defendant Luis Estrada Moya, with his counsel, Burt Henson, and defendant Augustine Baldonado, with his attorney John Danch, present.

At this time said defendants move the Court for a change of venue, pursuant to Section 1033 of the Penal Code.

Said motion is argued by respective counsel, submitted and taken under advisement by the Court.

Cause is continued until January 15, 1959, at 10:00 A.M. for Court's ruling on said motion.

Defendants are remanded.

[fol. 32] IN SUPERIOR COURT OF VENTURA COUNTY

Thursday, January 15, 1959. 9:30 O'Clock A.M.

ORDER DENYING MOTIONS FOR CHANGE OF VENUE

Deputy District Attorney W. J. Deem and the defendants Luis Estrada Moya and Augustine Baldonado, with their respective counsel, Burt Henson and John Danch, present.

Cause comes on at this time for hearing Court's ruling on said defendants' motions for change of venue.

Said motions for change of venue having heretofore been submitted to the Court for its consideration and decision and the Court having fully considered the same, and being fully advised, it is by the Court ordered that said motions be and the same are hereby denied as fully set forth in the signed order on file herein.

[fol. 33] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

[Title omitted]

NOTICE OF MOTIONS—Filed January 20, 1959

To: Roy A. Gustafson, District Attorney, County of Ventura.

You Will Please Take Notice that on January 20, 1959 at 9:30 A.M. or as soon thereafter as counsel may be heard, defendant Luis Moya, through counsel, will move for a continuance of the above entitled case and for an inspection of evidence.

The motion for continuance will be made under the provisions of Section 1050 of the Penal Code based upon the affidavit of Burt M. Henson attached hereto.

The motion for inspection of evidence is made under the law as set forth in Powell v. Superior Court (1957), 48 C. 2d 704 and based upon the affidavit of Luis Moya attached hereto.

Burt M. Henson, Attorney for Defendant Luis Moya.

I hereby accept service of a copy of the Notice of Motion this 19th day of January, 1959.

Roy A. Gustafson, District Attorney, County of Ventura, State of California.

[fol. 34] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

MOTION FOR CONTINUANCE (PC 1050)

[Title omitted]

Defendant, Luis Moya, by and through his counsel, Burt M. Henson, hereby moves for continuance of his trial on grounds that the ends of justice require a continuance.

This motion is made under the provisions of Section 1050 of the Penal Code and upon the affidavit of Burt M. Henson attached hereto and incorporated herein.

Burt M. Henson, Attorney for defendant Luis Moya.

[fol. 35] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

Burt M. Henson, being first duly sworn, deposes and says that:

I am an attorney licensed to practice law in the State of California and maintain an office for that purpose at 65 South Palm Drive, Camarillo, California.

The County of Ventury has no office of the public defender. The Superior Court and the various inferior courts of the County of Ventura appoint attorneys in the private practice of law as defense counsel for indigent defendants charged with felonies.

Affiant was appointed defense counsel for defendant Luis Moya in the above entitled matter on December 30, 1958. Arraignment of defendant Luis Moya had been set for January 6, 1959 at 2 P.M. Affiant exercised due diligence in conferring with defendant Luis Moya and attempting to familiarize himself with the case through a reading

of the Grand Jury transcript filed in the case and inter-
[fol. 36] views with other persons and attorneys.

On January 6, 1959, affiant appeared with defendant Luis Moya in the Superior Court and requested and was granted a week's continuance to enter a plea. The arraignment was continued to January 13, 1959 at 9:30 A.M. After his appearance with defendant Luis Moya on January 6, 1959, affiant became convinced that the defendant could not receive a fair and impartial trial in the County of Ventura. Affiant, on January 13, 1959, respectfully moved the above entitled court for a change of venue on grounds that a fair and impartial trial could not be had in the County of Ventura. The motion was duly argued, taken under submission and denied on January 15, 1959.

On January 6, 1959, a trial date was set for co-defendant Elizabeth Ann Duncan for February 16, 1959 at 10 A.M. The District Attorney had requested the court to set the trial date for co-defendant Duncan for February 9, 1959 and had requested a separate trial for co-defendant Duncan on another charge for three weeks after the arraignment date of January 6, 1959. Only after urgent pleadings on part of counsel for co-defendant Duncan did the District Attorney accede to a later date for both trials, and the trial in the above entitled case was regularly set for February 16, 1959.

At the time of setting of trial for co-defendant Duncan for February 16, 1959, the court inquired of affiant whether or not that date was also satisfactory for trial of defendant Luis Moya. Affiant objected to such an early trial date in view of the widespread publicity given the case which would make it difficult to select a jury and to otherwise conduct a trial under public pressure. Affiant suggested to the court that the trial date be postponed to sometime in the middle of March to allow public sentiment to subside.

The trial for defendant Luis Moya and co-defendant Augustine Baldonado was formally set for February 16, [fol. 37] 1959, after entry of plea on January 13, 1959. Counsel for co-defendant Augustine Baldonado strenuously objected to the early trial date on grounds of pending cases. Affiant intended to make a similar objection to the early trial date, but when the objection of counsel for co-defend-

ant Augustine Baldonado was summarily denied, affiant considered that a similar objection to the early trial date would be pointless.

However, affiant feels that he must go on record at this time as seriously objecting to the trial date of February 16, 1959. Affiant believes that the ends of justice require a continuance of not less than four weeks to enable him to prepare adequately for trial.

The defendant is charged with the murder of Olga Duncan. The District Attorney has caused to be published the following statement: "The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California." Affiant believes this to be the District Attorney's personal opinion that the defendants charged have committed murder in the first degree. The District Attorney has also caused to be published his opinion that the chances of rehabilitation of defendant Luis Moya are "awfully slim". The District Attorney has publicly announced his intentions to seek the death penalty for the defendants. In the face of these announced intentions alone, affiant believes he should be entitled to sufficient time to prepare for trial in a case of the magnitude of this one.

Affiant further alludes to exhibits filed in connection with his motion for a change of venue that prosecution commenced investigation of the case on or before December 15, 1958, numerous witnesses were interviewed by the prosecution, numerous scientific tests and examinations were conducted by agents of the prosecution, the grand jury of Ventura County heard nine hours of testimony before re- [fol. 38] turning indictments. In subsequent newspaper accounts of this case, it was reported that one witness, Emma Short, gave false testimony before the grand jury. There was a report published as a result of an interview with attorney Charles Lynch of Santa Barbara. This one instance of apparently false testimony causes affiant to believe that the ends of justice will only be served by an independent interview and investigation of not only the witnesses appearing before the grand jury, but those who made statements to police officers as reported in the newspaper exhibits on file in this case. Affiant believes he will

have difficulty interviewing such witnesses because affiant will not be acting under the color of any recognized law enforcement agency. Affiant believes such necessary interviews and investigations will be a time-consuming operation.

The court has ordered that a trial jury of 150 persons be drawn and summoned for the above entitled case. It will be necessary to investigate and evaluate the background of each juror to assure the defendant of a fair and impartial trial. This, too, will be a time-consuming operation.

Under the provisions of Section 190.1 of the Penal Code, in cases where the death penalty may be imposed, evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. Affiant must also prepare for this eventuality and of necessity must interview many persons who knew the defendant and must carry on other investigations in that regard. This, too, will be a time-consuming operation.

Affiant does not specialize in criminal law cases, but is engaged in the general practice of law. Affiant does not specialize in trial cases and engages in trials only when settlement of his own cases cannot be accomplished. It will [fol. 39] be necessary for affiant to consume considerable time to inform himself of recent developments and refinements of the criminal law and the laws of evidence to adequately prepare for the above entitled case.

Affiant is a partner in a two-man law firm. This two-man law firm has been in existence only since January 1, 1958. Affiant's partner was recently elected Judge of the Moorpark-Camarillo Judicial District and has served in that capacity since January 5, 1959. Affiant's partner's absence from the office has resulted in a greater work load on affiant and those clients of affiant's partner now call upon affiant for their regular legal work.

Affiant has the following cases scheduled for trial and court appearances at the present time:

January 22, 1959—Superior Court, Ventura County
Southern Pacific Milling Co. v. Condon, et al
Estimated trial time: 1½ to 2 days.

January 26, 1959—Superior Court, Ventura County
Vasquez v. Vasquez
Estimated Trial Time: ½ day.
February 6, 1959—Superior Court, Ventura County
Strathearn v. Dennis
Estimated Trial Time: ½ to 1 day.
February 11, 1959—Superior Court, Los Angeles County
Wyckoff and Bianchi vs. Richards, et al
Estimated Trial Time: 4 to 5 days.

These cases also require some preparation and investigation. Affiant will make and has made every effort to settle these cases and others not listed before the trial date of February 16, 1959. However, the above entitled court must realize that it takes time to settle and continue cases.

Affiant, as a favor to the law enforcement agencies of Ventura County, has assisted in the conducting of classes for law enforcement officers at Ventura College. Classes are scheduled for the following dates and times:

1. January 20, 1959—Court Organization and Procedure
12:30-3:30 P.M. and 7:00 to 10:00 P.M.

[fol. 40] 2. January 21, 1959—Court Room Behavior
12:30-3:30 P.M. and 7:00 to 10:00 P.M.

Affiant has tried in vain to seek other persons to conduct these classes, but has been unable to do so because it is necessary that an accredited instructor conduct the classes.

Affiant does not request a lengthy continuance. Affiant is aware of the problems of the prosecution and can see no reason why a short continuance would in any way hinder the proper prosecution of this case. The request for continuance is made in good faith for the reasons set forth above. The request for continuance is made for the sole purpose of affording defendant Luis Moya an adequate defense and to serve the ends of justice.

Affiant has been diligent thus far, has worked every Saturday and Sunday and holiday since being appointed. Affiant has also worked every work day and on numerous occasions at night. Affiant is convinced at this point that

he will not be adequately prepared for trial on February 16, 1959.

Defendant Luis Moya and his counsel are ready and willing to waive any time limitations for trial.

Burt M. Henson.

Subscribed and sworn to before me this 19th day of January, 1959.

[Name illegible], Notary Public, in and for said County and State.

[fol. 41] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

[Title omitted]

MOTION FOR INSPECTION

Defendant, Luis Moya, by and through counsel, hereby moves the above entitled Court to order the Sheriff and District Attorney of the County of Ventura to make available for inspection a tape recording of defendant's alleged confession to Deputy Sheriff Raymond Higgins of the Sheriff's Department of Ventura County on or about December 26, 1958, and that a qualified member of either the Sheriff's Department or the District Attorney's office be directed to play the said tape recording and that defendant and counsel be permitted to listen to said tape recording.

This motion is supported by the affidavit of defendant Luis Moya.

Burt M. Henson, Attorney for Defendant Luis Moya.

[fol. 42] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF CALIFORNIA,
County of Ventura, ss:

Luis Moya, being first duly sworn, deposes and says that:

He is a defendant in the above entitled action.

He was in the custody of the Sheriff of Ventura County on or about December 26, 1958 in the City of Ventura.

On or about December 26, 1958, affiant was interrogated by Deputy Sheriff Raymond Higgins of the Sheriff's Department of Ventura County, and made certain statements concerning his implication in an alleged charge of the unlawful killing of Olga Duncan. The said interrogation was tape recorded and affiant believes that said tape recording is now in the possession of either the Sheriff of Ventura County or the District Attorney of Ventura County.

Affiant is unable to recall and is unable to relate to his counsel the questions asked and his statements in reference thereto which were tape recorded by the members of the Sheriff's Department.

[fol. 43] The tape recording of the questions asked and his statements in reference thereto may be necessary to refresh his recollection.

The evidence contained in the said tape recording is material to the issues of liability, if any, of affiant.

Affiant is informed by counsel that the evidence contained in the said tape recordings would probably be admissible at the time of trial on behalf of the People as constituting confession or admissions.

Neither affiant nor his counsel have been furnished transcriptions of the said tape recording or been allowed to listen to the playing of the said tape recording.

Affiant believes and is informed by his counsel that to allow him to refresh his recollection from a playing of the said tape recording is necessary to accord him a fair and

mpartial trial, to assist him in intelligently preparing his defense and to avail himself of competent material and relevant evidence which would tend to throw light on the subject matter on trial.

Luis Moya.

Subscribed and sworn to before me this 19th day of January, 1959.

Burt M. Henson, Notary Public in and for said County and State.

[fol. 44] In Superior Court of Ventura County

Tuesday, January 20, 1959. 9:30 O'Clock A.M.

Order on Motions

The District Attorney and defendant Luis Estrada Moya, with his counsel Burt Henson, present.

At this time defendant's motion for permission to hear a certain tape recording played back is by the Court granted.

Thereupon, defense counsel moves the Court for a continuance of the trial date.

Said motion is argued by respective counsel, submitted and by the Court denied.

Defendant is remanded.

[fol. 45] [File endorsement omitted]

In the Superior Court of the State of California in and for the County of Ventura

No. CR 3220

[Title omitted]

Motion to Withdraw Plea of Not Guilty (P. C. 1018)—Filed January 29, 1959

I, Luis Estrada Moya, hereby move the above entitled Court to withdraw my plea of not guilty heretofore entered to an indictment which charged me with a violation of Section 187 of the Penal Code, murder.

I understand that a withdrawal of my plea of not guilty means that I am admitting the violation of Section 187 of the Penal Code, murder. I understand that my plea of not guilty by reason of insanity still stands. I further understand that the offense which I am admitting can be punishable by death or life imprisonment. I also understand that I have the right to a trial on the issue of penalty wherein it will be decided whether I shall be punished by death or life imprisonment.

I further admit that the violation of Section 187 of the Penal Code is murder in the first degree in that it was willful, deliberate and premeditated within the legal definitions [fol. 46] thereof as explained to me by my attorney, Burt M. Henson. I have been fully advised of the legal consequences and the legal effect of this motion by my attorney. I have been offered no promises of immunity by any legal authority for making this motion. This action is undertaken by me because it sets forth the truth as I see it under the laws of God and man. This action is of my own free will and accord.

Luis Estrada Moya.

I have fully explained to Luis Estrada Moya the legal consequences and the legal effect of the motion to withdraw the plea of not guilty as set forth above. I hereby join in the motion being fully informed of the legal consequences and the legal effect thereof.

Burt M. Henson, Attorney for defendant, Luis Estrada Moya.

[fol. 47] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

[Title omitted]

MOTION FOR SEPARATE TRIAL (P. C. 1098)—Filed January 29, 1959

Defendant Luis Estrada Moya, by and through his counsel, Burt M. Henson, hereby moves the above entitled Court for a trial separate from defendant Elizabeth Ann Duncan and defendant Augustine Baldonado.

This motion is directed to the Court's discretion under the provisions of Section 1098 of the Penal Code.

Burt M. Henson, Attorney for defendant, Luis Estrada Moya.

[fol. 48] IN SUPERIOR COURT OF VENTURA COUNTY

Thursday, January 29, 1959. 9:30 O'Clock A. M.

ORDER GRANTING MOTION TO WITHDRAW PLEA OF NOT GUILTY AND MOTION FOR SEPARATE TRIAL

The District Attorney and defendant Luis Estrada Moya, with his counsel, Burt Henson, are present in Court. Cause comes on at this time for further proceedings at request of said defendant.

Defendant Moya thereupon moves the Court for permission to withdraw his plea of not guilty heretofore entered as set forth in the signed motion filed herein, and said motion is by the Court granted.

Said defendant also moves the Court for a separate trial on the insanity plea and issue of penalty and said motion is by the Court granted.

With defendant waiving statutory time, jury trial as to insanity and penalty issues is thereupon set for April 20, 1959, at 10:00 A.M. and it is ordered that 100 prospective jurors be summoned for said date.

Said defendant is remanded to the custody of the Sheriff.

[fol. 49] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

[Title omitted]

APPLICATION FOR LEAVE TO APPEAR AS AMICUS CURIAE.—Filed February 19, 1959

The undersigned is a member of the bar of California, of the Supreme Court of California and of the Supreme Court of the United States.

He is general counsel for the American Civil Liberties Union of Southern California.

He desires to appear herein amicus curiae, on the defendants' motions for change of venue, solely out of concern for due process of law and fair trial as guaranteed by the Constitution of the United States and the Constitution of the State of California.

It is this concern which prompted the appearance of the applicant either as amicus in behalf of the American Civil Liberties Union, or as counsel furnished to the individual involved by the American Civil Liberties Union in the following cases:

People v. *Cahan*, 44 Cal. 2d 434;
Rochin v. *California*, 342 U.S. 165;
[fol. 50] *Stroble* v. *California*, 343 U.S. 181;
Crooker v. *California*, 357 U.S. 433.

Of the appearance of counsel for the American Civil Liberties Union as amicus in a case before it, the Supreme Court of the United States, in *Minersville District* v. *Gobitis*, 310 U.S. 586, at 593, said:

> ". . . By their able submissions, the Committee on the Bill of Rights of the American Bar Association and the American Civil Liberties Union, as friends of the Court, have helped us to our conclusion."

Wherefore, applicant asks leave of Court to appear as amicus curiae herein.

Respectfully submitted, A. L. Wirin.

[fol. 51] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

CR. 3220

[Title omitted]

NOTICE OF MOTION FOR ORDER QUASHING FOREIGN SUBPOENA—Filed April 9, 1959

Notice is Hereby Given to Luis Moya through Burt M. Henson, his attorney of record, that on Tuesday, April 14, 1959, at 9:30 a.m., or as soon thereafter as the matter may be heard, at the Honorable Superior Court of the State of California, in and for the County of Ventura, at the courtroom thereof, in the Courthouse, in the City of Ventura, California, Fred R. Dickson will move the Court for an order quashing Foreign Subpoena in the case of the *People of the State of California* v. *Elizabeth Duncan, Luis Moya and Augustine Baldonado*, CR. 3220. Said motion will be made on the ground that he can give no relevant and material testimony in the case for which his appearance is sought, based upon the memorandum of points and authori-
[fol. 52] ties and supporting affidavits attached thereto.

Respectfully submitted, Stanley Mosk, Attorney General, William E. James, Assistant Attorney General. Ernest E. Sanchez, Deputy Attorney General, Attorneys for Petitioner.

[fol. 53] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

CR. 3220

MOTION TO QUASH FOREIGN SUBPOENA—Filed April 9, 1959

Comes Now Fred R. Dickson, Warden of the California State Prison at San Quentin, San Quentin, California, and moves to quash the Foreign Subpoena served upon him on behalf of Luis Moya, commanding his appearance at Ventura, California, on April 20, 1959 as a witness in the case

of the *People of the State of California* v. *Elizabeth Duncan, Luis Moya, and Augustine Baldonado*, a proceeding to fix the penalty against Luis Moya under Penal Code Section 190.1, on the ground that he can give no testimony which is relevant and material to the said case since he has no personal knowledge of Luis Moya, or the circumstances of the crime, or of any fact or circumstance which could properly be considered in aggravation or mitigation of the penalty to be imposed therefor.

Dated this 8th day of April, 1959.

Stanley Mosk, Attorney General, William E. James, Assistant Attorney General. Ernest E. Sanchez, Deputy Attorney General, Attorneys for Petitioner.

[fol. 54] POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH FOREIGN SUBPOENA

The Foreign Subpoena issued for the presence of Warden Fred R. Dickson was obtained pursuant to Penal Code Section 1330. Luis Moya, through Bert M. Henson, his attorney of record stated by affidavit that he believed the testimony of the witness material and his attendance necessary to the defense. We dispute these contentions and have set forth by way of Warden Dickson's affidavit the reasons why we believe that he cannot give material and relevant testimony in the case at bar. It is settled, of course, that a witness cannot be required to testify where his appearance and testimony is neither pertinent nor material to the facts in issue.

State Bar of California v. *Superior Court*, 207 Cal. 323, 339.

The California courts and the courts of other jurisdictions have applied this principle in several analogous situations. Thus, it has been held that a court may properly refuse to issue a bench warrant to compel the attendance of witnesses who have been served, but do not appear where there is no showing made to the court as to the materiality

of the witnesses' testimony or what is sought to be proved by them.

People v. *Marseiler*, 70 Cal. 98, 101-102.

Thus, also, it has been held that a party served with a subpoena duces tecum has standing to limit the scope of the subpoena to documents material to the issues to be tried.

Pelton Motors, Inc. v. *Superior Court*, 120 Cal. App. 2d 565, 569-570.

The court has power to refuse a continuance for the purpose of securing the attendance of witnesses where it [fol. 55] appears that the testimony of the witnesses is not relevant and material.

O'Rourke v. *State*, (Neb.) 90 N. W. 2d 820, 823-824.

The court has power to refuse to compel the summoning of witnesses where their testimony is not material and relevant, (*Tilghman* v. *State*, (Fla.) 51 So. 2d 785, 786) and, conversely, where the court is shown the materiality of the testimony it is error not to compel process.

People v. *Bossert*, 14 Cal. App. 111, 113-116.

From the above authorities, which show among other things that when a witness can give no material and relevant testimony, he cannot be compelled to testify and that the court is justified in refusing to summon him, to grant a continuance so that his presence might be obtained, or to issue an attachment to compel his attendance, we submit that it follows that the court has the discretion and the duty to quash a foreign subpoena that has been issued for a witness who cannot give material testimony. To force the attendance of such a witness from a distance, causing him inconvenience, expense, and labor, is not only an idle and a useless act which does nothing to promote justice, but it would also appear to be an abuse of process.

Furthermore, it is worth noting that the witness whose appearance is sought is a responsible State official: the warden of San Quentin Prison. Where a public official is

subpoenaed it has been held that failure to inquire into the materiality of the testimony expected is an abuse of discretion and that if it appears that the witness can give no relevant testimony the court should not require his attendance.

Overholser v. *De Marcos*, 149 F. 2d 23, 26.

[fol. 56] A court is fully justified in refusing to call a public official where it is not informed what testimony is expected from him.

May v. *U.S.*, & *Garsson* v. *U. S.*, 175 F. 2d 994, 1010.

We point out that if the warden can be compelled to attend and testify in this case where he can give no material testimony as to any of the questions in issue, it follows that he can be compelled to testify in every capital case which occurs in this state. Thus he will be exposed to continual harassment, extensive demands upon his time and energy, and interference with the orderly performance of his duties.

We find further support for the motion to quash from the fact that under Penal Code Section 1329, it is possible for a witness in a criminal proceeding to be paid fees and reasonable expenses from public funds. Cases arising under the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases, an analogous situation, have held that the materiality of the witness's testimony must be shown to the court before process will be compelled at public expense.

State v. *Blount*, (Ore.) 264 F. 2d 419, 428, 44 A.L.R. 2d 732;
State v. *Fouquette*, (Nev.) 221 F. 2d 404, 410.

We think it is established by Warden Dickson's affidavit that he cannot give material and relevant testimony of his own knowledge concerning the defendant and his crime. It might be argued, of course, that his testimony is sought as a specialist. The Department of Corrections, however, provides in its rules (Chapter V, Article 4, D54-14, Section 10, a certified copy of which is attached) that no member of [fol. 57] the department may give testimony as a specialist

in a criminal proceeding which may result in the defendant being sentenced to an institution of the Department of Corrections. This rule, it is easy to see, is based on sound administrative reasoning and we submit that it contributes much to the department's success in the effective and impartial administration of its duties and in its enjoyment of public confidence. We submit that as a matter of judicial policy this internal rule of the department should not be set aside where, as here, justice does not require it.

Indeed, we submit that as a general rule no specialist testimony should be *compelled* by process. As was said in *Ex Parte Noelker* (1854), F. Cases No. 11,995 (1 Spr. 276) Dist. Court D (Mass.) where an interpreter was placed under subpoena but failed to attend:

> "When a person has knowledge of any fact pertinent to an issue to be tried he may be compelled to attend as a witness. In this all stand an equal ground. But to compel a person to attend merely because he is accomplished in a particular science, art, or profession, would subject the same individual to be called upon, in every court in which any question in his department of knowledge is to be solved . . . this is so unreasonable . . . that nothing but necessity can justify it . . ."

See, also, *Braverman* v. *Braverman*, (New Jersey), 91 A. 2d 226, 227 where the court rules that one cannot be compelled to give expert testimony unless one contracts to do so.

Respectfully submitted, Stanley Mosk, Attorney General, William E. James, Assistant Attorney General. Ernest E. Sanchez, Deputy Attorney General, Attorneys for Petitioner.

[fol. 58] In Superior Court of Ventura County

Tuesday, April 14, 1959. 9:30 O'Clock A.M.

CR 3220

The People, etc.,

vs.

Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado

Motion to Quash Subpoena

The District Attorney, Deputy Attorney General Ernest E. Sanchez, and defendant Luis Estrada Moya, with his counsel Burt M. Henson are present in Court.

Cause comes regularly on at this time for hearing motion to quash foreign subpoena heretofore served upon Fred R. Dickson in the above entitled cause.

Said motion is argued by respective counsel, submitted and taken under advisement by the Court.

[fol. 59] In Superior Court of Ventura County

Order Quashing Motion—April 14, 1959

The motion of Fred R. Dickson for the Order hereinafter made came on regularly to be heard this day. Stanley Mosk, Attorney General of the State of California, by William E. James, Assistant Attorney General, and Ernest E. Sanchez, Deputy Attorney General, appeared as counsel for Fred R. Dickson, and Burt M. Henson, Esquire appeared as counsel for Luis Moya.

Upon proof being made to the satisfaction of the Court and good cause appearing therefor,

It is Ordered that the Foreign Subpoena commanding Fred R. Dickson to appear before the Superior Court of the State of California in and for the County of Ventura in the case of the *People of the State of California* v. *Elizabeth Duncan, Luis Moya, and Augustine Baldonado* CR. 3220, at 10:00 a.m., on April 20, 1959 be and is quashed.

Dated this 14th day of April, 1959.

Chas. F. Blackstock, Judge of the Superior Court.

[fol. 69] IN SUPERIOR COURT OF VENTURA COUNTY

AFFIDAVIT IN SUPPORT OF MOTION TO QUASH SERVICE OF FOREIGN SUBPOENA

STATE OF CALIFORNIA,
County of Marin, ss:

Comes now Fred R. Dickson, and being duly sworn deposes and says that he is the Warden of the California State Prison at San Quentin, San Quentin, California, and that he has been duly served with a foreign subpoena, issued March 14, 1959, by the Superior Court of the State of California, in and for the County of Ventura, commanding his presence before the Court on the 20th day of April, 1959, at 10:00 A.M., as a witness on behalf of Luis Moya, in a criminal action prosecuted by the People of the State of California against Elizabeth Duncan, Luis Moya and Augustine Baldonado (Ventura County Criminal File #CR 3220).

Your affiant is informed and believes that the purpose of the said foreign subpoena is to procure his testimony in proceedings taken under Penal Code Section 190.1, to determine the issue of penalty as to defendant Luis Moya. Your affiant deposes and says that he has no personal knowledge of defendant Luis Moya; that he has no personal knowledge of any material or relevant facts concerning the circumstances of the crime; and that he has no personal knowledge of any facts or circumstances material or relevant to the mitigation or aggravation of the punishment thereof.

Your affiant therefore deposes and says that he cannot give material and relevant testimony concerning any of the issues in the said criminal proceedings, and prays that his motion to quash service of this foreign subpoena be granted by the Court.

Dated: April 3, 1959.

Fred R. Dickson, Warden.

Subscribed and Sworn to before me this 3d day of Apr
1959.

Alice ——, Notary Public in and for the County
Marin, State of California.

My Commission Expires January 20, 1961.

[fol. 61] I, Fred R. Dickson, Warden of the Californ
State Prison at San Quentin, California, do declare
provided for by § 2015.5 of the Code of Civil Procedu
and, under penalty of perjury, that the following is a tr
and accurate copy of Rule D-5414—Section 10 contain
under Chapter V—Article 4 of the Rules and Regulatio
of the Director of Corrections, State of California:

"D5414. Imcompatible Activities and Employment. I
conformity with Sections 18000, 19250, and 19251 of the Go
ernment Code and Section 70 of the Penal Code, no em
ployee of the Department of Corrections shall engage i
any other employment, activity or enterprise inconsiste
or incompatible or in conflict with the program of th
Department of Corrections. Activities and enterprise
deemed to fall in such categories shall include but are no
limited to the following: . . .

"10. Participating as a specialist to give testimony i
a criminal proceeding which may result in the defendan
being sentenced to an institution of the Department o
Corrections except in cases wherein the Department o
Corrections is a party to the action."

Fred R. Dickson, Warden.

[fol. 61a] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

[Title omitted]

DECLARATION IN OPPOSITION TO MOTION TO QUASH SERVICE OF FOREIGN SUBPOENA

I, Burt M. Henson, hereby declare under penalty of perjury that the following is true and correct:

I am an attorney regularly licensed to practice law in the State of California. On or about December 30, 1958, I was appointed by the Superior Court of the State of California in and for the County of Ventura, to represent the above named defendant Luis Moya.

On or about January 13, 1959, defendant Luis Moya entered dual pleas of not guilty and not guilty by reason of insanity. On January 29, 1959, defendant Luis Moya withdrew his plea of not guilty and admitted that the degree of murder was of the first degree. Pursuant to Section 190.1 of the Penal Code, a penalty trial was set for April 20, 1959. The degree of murder having been fixed at first degree, the sole issue at the penalty trial set for April 20, 1959, is whether defendant Luis Moya shall be punished by death or life imprisonment.

After researching the law pertaining to penalty trials [fol. 61b] under Section 190.1 of the Penal Code, I believed and do believe that the testimony of Fred R. Dickson was and is necessary, relevant and material to the issue of penalty. The reasons for my belief are set forth in the memorandum of points and authorities in opposition to the motion to quash foreign subpoena.

On March 13, 1959, the Honorable William A. Reppy, Judge of the Superior Court of the State of California in and for the County of Ventura endorsed a foreign subpoena to compel the attendance of Fred R. Dickson at the penalty trial on April 20, 1959. The foreign subpoena was regular in form and contained my affidavit that the presence of Fred R. Dickson was necessary in order to present relevant and material evidence on the issue of penalty.

On March 16, 1959, I served the subpoena upon Fred R. Dickson in San Quentin Prison in the County of Marin. Before serving the subpoena, I conversed with Fred R. Dickson and explained my purpose in seeing him. I explained to him that I would question him at the penalty trial concerning the method by which the death penalty is administered in California. Fred R. Dickson stated to me that as Warden of San Quentin Prison, he was familiar with the method by which the death penalty was administered in California, that all executions of the death penalty are administered at San Quentin Prison, that he as the Warden is required to be in attendance at all executions of the death penalty in California, and that the correctional officers who actually inflict the death penalty are under his direction and control. In casual conversation, Warden Dickson went on to explain the difficulty he has encountered through last minute stays of execution when it was uncertain whether or not any legal actions to stay executions were pending.

I stated to Warden Dickson that I knew he had many responsibilities, that I would not insist that he be available and present at all stages of the trial, that I would telephone him at least twenty-four hours prior to the time he would [fol. 61c] be scheduled to testify and that I would cooperate in every way possible to minimize the inconvenience to him and the State of California by his appearance as a witness at the penalty trial.

In connection with the penalty trial of defendant Luis Moya, on April 20, 1959, I intend to call Fred R. Dickson as a witness to describe how the death penalty is inflicted in California. I consider this evidence vital and indispensable as set forth in the memorandum of points and authorities filed in opposition to the motion to quash the subpoena. I believe Fred R. Dickson to be the only qualified person in the State of California to describe how the death penalty is administered. I will endeavor in every way possible to conserve his time and energy so as not to interfere with the orderly performance of his duties as Warden of San Quentin Prison. I do not anticipate that his testimony will require his absence for more than one day. I do not intend to ask his opinion as an expert in any matter. I do not intend to ask his opinion concerning

any hypothetical set of facts. I intend to ask him only to describe what he has observed as a percipient witness to all phases of the administration of the death penalty in California. I do not believe that this testimony will in any way be incompatible with his duties as Warden of San Quentin or his duties as an official of the Department of Corrections.

I declare under the penalty of perjury that the foregoing is true and correct.

Dated: April 13, 1959.

Burt M. Henson.

[fol. 61d] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

[Title omitted]

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO QUASH FOREIGN SUBPOENA

The defendant in a criminal case has the constitutional right to subpoena witnesses to testify in his behalf. Denial of this right or any infringement upon this right would be a violation of the defendant's right to a fair and impartial trial. It is the duty of every witness to attend Court as long as commanded and to testify to all material facts within his knowledge. This is a duty resting upon all members of the community to aid the Courts in the administration of justice.

Article I section 13 of the California Constitution
14th Amendment, United States Constitution
6th Amendment, United States Constitution

Material witnesses may be subpoenaed who reside out of the county of the forum if the procedural requirements of Section 1330 of the Penal Code are complied with. The declaration of Burt M. Henson is uncontradicted that the procedural requirements of Section 1330 of the Penal Code [fol. 61e] were complied with in this case.

The testimony of Fred R. Dickson is material and it is necessary that he appear to testify in behalf of defendant

Luis Moya. The absence of his testimony and refusal of the Court to compel such testimony would result in a serious infringement upon the right of the defendant to a fair and impartial trial. Section 190.1 of the Penal Code provides that if a person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented after further proceedings on the issue of *penalty*, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty.

The clear legislative intent, both express and implied, is that evidence shall be presented concerning the penalty. One of the purposes of the enactment of Section 190.1 was to eliminate the so-called "silent verdict" which had provided for the imposition of the death penalty in the absence of a recommendation of life imprisonment by the jury. Another legislative purpose was to vest discretion in the trier of fact to impose either life imprisonment or death. Another legislative purpose was to provide for the reception of any evidence which would guide the trier of fact in the exercise of its discretion to impose either life imprisonment or death.

People vs. Greene (1956), 47 Cal. 2d. 209
People vs. Friend (1958), 50 Cal. 2d. 570

Cases have uniformly held that the discretion of the trier of fact to select the penalty is absolute. The trier of fact is not required to make its determination of the penalty on the basis of mitigating or aggravating circumstances. The Courts have not placed any limitation upon the discretion to be exercised by the trier of fact. If the [fol. 61f] trier of fact is to have complete discretion as to whether to impose life imprisonment or death, it is indispensable that the trier of fact understand and know and receive evidence concerning how the death penalty is inflicted.

People vs. Feldkamp (1958), 51 A.C. 234
People vs. Ward (1958), 50 Cal. 2d. 702

It has been the practice that the Court may instruct the jury that a person under a life sentence may be eligible for parole at the end of seven calendar years. In People vs. Greene, supra, the defendant complained of error because the prosecution argued the fact that the defendant under a life sentence is eligible for parole after seven years. The Court in that case stated that "it is to be presumed that defendant, if he had sought to do so, would have been accorded opportunity to other related pertinent facts as to minimum, median and maximum terms of imprisonment actually served for first degree murder". It seems clear that the defense can introduce evidence concerning the minimum, median and maximum terms actually served for first degree murder. If all the ramifications of a life imprisonment sentence can be introduced into evidence, it would seem to follow logically that the method by which the alternate death penalty is inflicted would be important evidence for the trier of fact to consider.

People vs. Barclay (1953), 40 Cal. 2d. 146
People vs. Byrd (1954), 42 Cal. 2d. 200

In People vs. Friend, supra, the Court, in discussing the absolute discretion of the jury to assess the penalty stated: "It is within their discretion alone to determine, each for himself, how far he will accord weight to the consideration of the several objectives of punishment, of the deterrence of crime, of the protection of society, of the desirability of stern retribution, or of sympathy or clemency, of age, sex, ... ignorance or weakness, etc." Insofar as the deterrence aspect of the infliction of the death penalty, it would be [fol. 61g] important to the jury to know whether or not the execution is public or publicly viewed. In considering retribution, it would be important to the trier of fact to know whether or not the prisoner suffers physical or mental anguish during the administration of the death penalty. Along the lines of retribution, the jury may well decide that the infliction of the death penalty is too humane. A person interested in clemency or sympathy may want to know whether or not the person to be executed suffers from or is tested for insanity. It does not seem possible that a trier of fact could or would be in any position to exercise

absolute discretion without a complete understanding of the two penalties concerned. It is clear that the testimony of Warden Dickson as to the method by which the death penalty is inflicted in California is not only material and relevant but vital and indispensable to the administration of justice in this case.

If the testimony as to how the death penalty is administered be vital and indispensable evidence in the penalty trial of Luis Moya, administrative problems of the witness and of the State of California, should not be considered. The moving party does not cite any cases where administrative problems of expense or inconvenience were any grounds for quashing a subpoena and opposing party knows of none. Even if the matter of administrative inconvenience or personal inconvenience is a consideration, the Court should also take into consideration the fact that the defendant on trial may well lose his life.

The affidavit in support of opposition to the motion to quash the foreign subpoena makes it clear that Warden Dickson is not being called as an expert witness. He is merely a percipient witness to a material fact relevant to the issue of penalty in this case. Whether or not Warden Dickson is an expert in a particular field or not is im-[fol. 61h] material so long as he is being questioned as to matters he has observed which are material to the case.

McClenahan vs. Keyes (1922), 188 Cal. 574
San Francisco vs. Superior Court (1951), 37 Cal. 2d. 227

Respectfully submitted, Burt M. Henson, Attorney for Defendant Luis Moya.

[fol. 62] In the Superior Court of the State of California in and for the County of Ventura

Order Granting Motion to Quash Foreign Subpoena—April 14, 1959

[Title omitted]

The (motion) of Fred R. Dickson to Quash the foreign subpoena served upon him on behalf of Luis Estrada Moya in the above entitled cause, having heretofore been argued

and submitted to the Court for consideration and decision and the Court having fully considered the same and being fully advised, now

Orders that said motion be and the same is hereby granted as prayed.

A true copy, attest,

Robert L. Hamm, Clerk, By Wm. R. Peacock, Deputy Clerk. (Seal.)

[fol. 63] In Superior Court of Ventura County

Tuesday, April 14, 1959. 9:30 O'Clock A. M.

Order on Motion to Quash Subpoena

The motion of Fred R. Dickson to quash the foreign subpoena served upon him on behalf of Luis Estrada Moya in the above entitled cause having heretofore been argued and submitted to the Court for consideration and decision and the Court having fully considered the same and being fully advised, now

Orders that said motion be and the same is hereby granted as prayed.

[fol. 64] [File endorsement omitted]

In the Superior Court of the State of California in and for the County of Ventura

No. CR 3220

[Title omitted]

Application for Removal of Action (P.C. 1033)—Filed April 16, 1959

Defendant Luis Estrada Moya, by his attorney Burt M. Henson, hereby applies to the above entiled Court for a removal of this action from the County of Ventura on the ground that a fair and impartial trial cannot be had within the County of Ventura.

Notice is hereby given to the District Attorney of the County of Ventura that this application will be presented to the Court on Thursday, April 16, 1959, at 9:30 A.M.

This application is made upon the affidavit of Burt M. Henson attached hereto and upon the affidavits heretofore filed in an application for removal of the action filed on or about January 13, 1959.

Dated: April 15, 1959.

Burt M. Henson, Attorney for Defendant, Luis Estrada Moya.

[fol. 65] I hereby acknowledge service of the application for removal of action and the affidavits upon which application is based this 15th day of April, 1959, at the hour of 9:00 A. M.

——— — ———, Deputy District Attorney, County of Ventura.

[fol. 66] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

[Title omitted]

DECLARATION IN SUPPORT OF APPLICATION FOR REMOVAL OF ACTION—Filed April 16, 1959

I, Burt M. Henson, hereby declare under the penalty of perjury that the following is true and correct:

I am an attorney regularly licensed to practice law in the State of California and was appointed by the above entitled Court on or about December 31, 1958, to represent the indigent defendant, Luis Moya. Defendant Luis Moya filed a prior application for removal of the action on or about Januuary 13, 1959, which application was supported by various affidavits and exhibits. I hereby incorporate by reference all of the affidavits and exhibits filed in sup-

port of the prior application for removal filed on or about January 13, 1959.

I believe now as I believed on January 13, 1959, when the prior application for the removal of the action was filed in the above entitled Court on behalf of defendant Luis Moya, that a fair and impartial trial cannot be had [fol. 67] within the County of Ventura because of the inflammatory remarks of the District Attorney of the County of Ventura, because of many press releases by other law enforcement officers concerning all phases of the case, and because of the widespread publicity given to this case by newspapers and television and radio newscasts.

The prior application for removal of the action filed on January 13, 1959, received the same type of front page publicity as any other aspect of the case as illustrated by Exhibit A-1 attached hereto and made a part hereof. Exhibit A-1 attached hereto and made a part hereof is also a typical illustration of the widespread publicity given to this case in reporting the denial of the application for removal of the action heretofore filed.

Subsequent to the denial of the former application for removal of the action on January 15, 1959, I, as attorney of record for defendant Luis Moya, filed a motion for continuance on grounds that I would have insufficient time to prepare for a case of this magnitude and for a case where the possible result insofar as Luis Moya was concerned was a sentence of death. This motion for continuance made on Jauuary 20, 1959, was denied with the usual publicity given the entire case as illustrated by Exhibit A-3 attached hereto and made a part hereof.

In view of the early trial date of the above named co-defendants, the lack of time to adequately prepare for the case, and in view of the bias and prejudice which I believe existed and in view of the evidence, I advised defendant Luis Moya to withdraw his plea of not guilty theretofore entered in the hope that a trial separate from co-defendant's Elizabeth Ann Duncan and Augustine Baldonado even if solely on the issue of penalty, at a later date, would afford defendant Luis Moya a better opportunity for a fair and impartial trial. Accordingly, on January 29, 1959 the defendant Luis Moya did withdraw his plea of not guilty. By stipulation with the district attorney, in return for my

[fol. 68] representation to advise Luis Moya to testify against co-defendant Elizabeth Ann Duncan, the district attorney agreed that the separate trial on the issue of penalty for defendant Luis Moya would be set for April 20, 1959.

The district attorney informed me that he would not agree to a separate penalty trial unless the defendant Luis Moya admitted that the degree of the offense charged was murder in the first degree. I was of the opinion at that time that there was no other choice in the matter and on January 29, 1959, Luis Moya did withdraw his plea of not guilty and admitted that the degree of the offense was first degree. This aspect of the case was also given widespread publicity as illustrated by Exhibit A-4 attached hereto and made a part hereof. As Exhibit A-5 attached hereto and made a part hereof illustrates, co-defendant Augustine Baldonado, followed the same course of action. At the District Attorney's insistence, the trial of co-defendant Baldonado was set for April 6, 1959, two weeks immediately prior to the trial of defendant Luis Moya.

On January 29, 1959, when defendant Luis Moya withdraw his plea of not guilty and moved for a separate trial on the issue of penalty, I was of the opinion that the lapse of time before trial would enable the prejudice and bias of prospective jurors in the County of Ventura to subside. I now believe that the prospective jurors of the County of Ventura are more biased and prejudiced than before because the lapse of time has been primarily concerned with the lengthy trial of co-defendant Elizabeth Ann Duncan, which lasted from February 16, 1959, to and including March 24, 1959. Sentence was not concluded until April 3, 1959, when the Court sentenced co-defendant Elizabeth Ann Duncan to die in the gas chamber. The period of time from April 6, 1959, to and including April 9, 1959, was consumed in the penalty trial of co-defendant Augustine Baldonado. In the case of the co-defendant Augustine Baldonado, the jury also fixed the punishment at death. Actual sentencing by the Court of co-defendant Augustine Baldonado to death was on April 14, 1959.

[fol. 69] In ruling upon my motion for continuance on January 20, 1959, the Court stated that if there were any prejudice or bias, it was against the crime and not the

defendants charged therewith. Frankly, I can see little difference in being prejudiced against the crime and being prejudiced against the defendants charged therewith, particularly when co-defendant Duncan was convicted and sentenced to death, when co-defendant Baldonado pleaded guilty and was sentenced to death and when defendant Moya has pleaded guilty.

The locally published newspaper with the widest circulation in the County of Ventura, the Star-Free Press, began a publicity build-up for the trial of co-defendant Duncan as early as February 2, 1959, with a story on co-defendant Duncan's attorney, as set forth in Exhibit A-6. In the February 14, 1959, issue of the Ventura Star-Free Press, attached hereto as Exhibit A-7, the recapitulation of the facts of the case was set forth even above the title of the newspaper on Page 1. Page 1 also contained a laudatory story about District Attorney Roy A. Gustafson pointing out that: "The Duncan case will mark the third time that Gustafson has asked a Ventura County jury for the death penalty. The other two times juries gave him what he asked . . .". An illustration of the widespread publicity given to the trial of co-defendant Duncan is set forth in Exhibit A-8, incorporated herein and made a part hereof, wherein the County Clerk-Recorder is described as setting up a special press room and a map to show the press representatives the relation of the press room to the Clerk's office and the Superior Court. The article also quotes the Court as having a couple of banks of lights which have been kept dark in recent years turned on for the benefit of photographers.

An illustration of the press coverage given this case is contained in Exhibit A-9 attached hereto and made a part hereof whereon the front page of the Ventura Star-Free Press is a large picture showing the photographers present in the Court Room taking pictures of co-defendant Duncan. [fol. 70] I believe the widespread publicity given this case by the press and other public media encouraged an abnormal amount of spectators to attend the trial in person. An illustration of the number of spectators attending the trial is set forth in Exhibit A-10, the March 5, 1959, issue of the Ventura Star-Free Press. I particularly allude to a photograph on the bottom of Page 1 of Exhibit A-10

showing persons who had brought their lunch to wait in line to attend the trial of co-defendant Duncan.

The press continued to publish close-up photographs of participants in the trial of co-defendant Duncan. An illustration is contained in Exhibit A-11, the February 17, 1959, issue of the Ventura Star-Free Press attached hereto and made a part hereof. A typical illustration is a series of close-up photographs of District Attorney Roy A. Gustafson appearing in the February 19, 1959, issue of the Ventura Star-Free Press, attached hereto and made a part hereof as Exhibit A-12.

Not only were close-up photographs of the attorneys and defendant published but as Exhibit A-13, the February 20, 1959, issue of the Ventura Star-Free Press, and Exhibit A-14, the February 24, 1959, issue of the Ventura Star-Free Press, the jury, too, was photographed closely and photographs published. Also included as an illustration is the March 12, 1959, issue of the Ventura Star-Free Press which is attached hereto and made a part hereof as Exhibit A-15.

Practically all the material witnesses had close-up photographs published as illustrated in Exhibit A-16, the February 26, 1959, issue of the Ventura Star-Free Press; Exhibit A-17 which is the March 10, 1959, issue of the Los Angeles Evening Mirror News which has wide circulation in the Ventura County area and is advertised as having the largest afternoon home delivery in the West, with a large picture of witness Frank Duncan. Exhibit A-18 is the March 19, 1959, edition of the Los Angeles Examiner which has wide circulation in the County of Ventura and [fol. 71] is one of the largest circulated newspapers in the Southern California area, showing a close-up photograph of witness George Satriano.

The Santa Barbara News Press advertises itself as the oldest daily paper in Southern California. Although not widely circulated in the County of Ventura, the City of Santa Barbara is located only 27 miles from the City of Ventura, and there is some circulation of the Santa Barbara News Press in the County of Ventura. Exhibit A-19 is the February 26, 1959, issue of the Santa Barbara News Press with a front page picture of the presiding judge at co-defendant Duncan's trial, along with a close-up photograph

of defendant Luis Moya testifying. Exhibit A-20 is the March 6, 1959, issue of the Santa Barbara News Press showing a close-up of co-defendant Elizabeth Duncan in a derogatory portrayal. Exhibit A-21 is a March 7, 1959, copy of the Santa Barbara News Press showing several photographs comparing the moods of co-defendant Duncan while testifying on the witness stand during the trial with corresponding photographs of her son, Frank Duncan, a material witness. Exhibit A-22 is the February 28, 1959, issue of the Santa Barbara News Press showing material witness Emma Short testifying.

Photographs of co-defendant Duncan appeared practically daily in the newspapers circulated in Ventura County. Exhibit A-32 is the March 4, 1959, issue of the Ventura Star-Free Press. Exhibit A-24 is the March 4, 1959, issue of the Santa Barbara News Press.

On several occasions, glaring and inflammatory headlines accompanied photographs in the daily papers with circulation in Ventura County. Exhibit A-25 is the March 10, 1959, issue of the Los Angeles Examiner with the following headlines: "Prosecutor hints Duncan knew his wife was slain". This inflammatory headline accompanied a photograph of material witness Frank Duncan testifying on the witness stand being examined by defense counsel S. Ward Sullivan. Exhibit A-26 is the March 18, 1959, issue [fol. 72] of the Los Angeles Examiner with the following headlines: "Eleven Witnesses Relate Lurid Details of Mrs. Duncan's Past". This headline was followed by a large picture of co-defendant Duncan with material witness Frank Duncan. Exhibit A-27 is the February 28, 1959, issue of the Los Angeles Examiner with the following headlines: "'Liar:' Mrs. Duncan Calls Witness". This headline was followed with a large picture of material witness Emma Short walking in front of the counsel table. Exhibit A-28 is the February 25, 1959, issue of the Los Angeles Examiner with the following headlines: "Mrs. Duncan Weeps As Three Accuse Her", followed by a photograph of co-defendant Duncan crying in the Court Room. Exhibit A-29 is the February 17, 1959, issue of the Los Angeles Examiner with the following headlines: "'Already Convicted!' Shouts Mrs. Duncan", followed directly underneath by a photograph of co-defendant Duncan adjusting the necktie

of material witness Frank Duncan in Court. Occasionally, pictures of co-defendant Duncan, attorneys or witnesses in the case did not appear on the front page, but the headlines rarely left the front page of any of the daily newspapers with circulation in Ventura County. Exhibit A-30 is the March 6, 1959, edition of the Los Angeles Examiner with the following headlines: "Mrs. Duncan Shouts And Sobs, Reveals She Has Six Children". A close-up photograph of material witness Frank Duncan and co-defendant Duncan with a verbatim account of testimony appears on Page 2.

Other examples of headlines are contained in Exhibit A-31 which is the March 6, 1959, issue of the Los Angeles Examiner in which the following headline appears: "Mrs. Duncan's Eleven Mates, Six Children Revealed". Exhibit A-32, the March 11, 1959, issue of the Los Angeles Examiner contains the following headline: "Mrs. Duncan Joy Over Bride's Vanishing Related".

Occasionally, during the course of the trial, the headlines were not inflammatory or glaring but photographs appeared constantly on front pages of the newspapers cir-[fol. 73] culated in Ventura County. An example of this is Exhibit A-33 which is the March 8, 1959, issue of the Los Angeles Examiner. See also Exhibit A-34, the January 14, 1959, issue of the Ventura Star-Free Press.

The results of the trial of co-defendant Duncan were given the widest possible coverage. Exhibit A-35 is the March 17, 1959, issue of the Ventura Star-Free Press in which the following headline appears: "Mrs. Duncan Found Guilty" followed by a large size picture of the Court Room after the guilty verdict was returned and a close-up photograph of co-defendant Duncan and her counsel as the jury was being polled. Co-defendant Duncan was sentenced to death after a penalty trial which concluded on Friday, March 20, 1959. This was reported in the Ventura Star-Free Press, March 21, 1959, issue, with large headlines: "Mrs. Duncan To Die" followed by large photographs of the Court Room scene just after the verdict was received. The March 21, 1959, issue of the Ventura Star-Free Press is attached hereto and made a part herself as Exhibit A-36. A portion of the Court Room scene appeared in the photograph on the front page of the March 21, 1959, edition of

the Oxnard Press-Courier with the following headline: "Gas Chamber For Mrs. Duncan". A copy of the March 21, 1959, issue of the Oxnard Press-Courier is attached hereto and made a part hereof as Exhibit A-37. Attached hereto and made a part hereof as Exhibit A-38 is the March 21, 1959, issue of the Los Angeles Examiner with the following headlines: "Duncan Must Die".

Exhibit A-39 through and including Exhibit A-59 are various issues of the Ventura Star-Free Press from January 19, 1959, to and including March 24, 1959, which are incorporated herein by reference as illustrations of the fact that the Duncan case rarely left the front page of the leading Ventura County daily newspaper during that period. Other examples of the constant publicity surrounding the trial of co-defendant Duncan are Exhibit A-60, A-61 and A-62, issues of the Los Angeles Examiner. Exhibit [fol. 74] A-63 through and including Exhibit A-80 are issues of the Santa Barbara News Press dating from February 16, 1959, to and including March 21, 1959, incorporated herein by reference as illustrations that the news of the trial of co-defendant Duncan rarely left the front page headlines.

Usually, news of the trial of co-defendant Duncan published in papers published outside the County of Ventura were relegated to second page status but this was rare. Attached hereto as Exhibits A-81, A-82 and A-83, are examples of this as issues of the Los Angeles Times. Ex-Exhibits A-84 and A-85 are also examples of the rare situation where the case was relegated to the second page.

Exhibits A-86 and A-87 are issues of the Oxnard Press-Courier again illustrating the widespread publicity given to the Duncan case by newspapers of circulation in Ventura County.

Exhibit A-88 is the April 9, 1959, issue of the Ventura Star-Free Press reporting the death penalty verdict for co-defendant Baldonado. Exhibit A-89 is the April 9, 1959, issue of the Oxnard Press-Courier reporting the same event.

Affiant believes that in addition to the photographs of Court Room activities appearing virtually in every daily newspaper with circulation in Ventura County on numerous occasions before, during and after the trial of co-defendant Duncan, practically every television newscaster whose sta-

tions are viewed in the County of Ventura had movie versions of Court Room scenes accompanying their newscasts and narration of the trial of co-defendant Duncan. Local radio stations had special broadcasting facilities from the Ventura County Court House. The Court Room was filled to overflowing capacity each day during the course of the trial. Court sessions started at either 9:30 or 10:00 A.M. in the morning and affiant has at 7:30 A.M. on several occasions seen 35 to 40 prospective spectators lined up at the [fol. 75] Court Room door. The Deputy Sheriff in charge of the door handed out tickets so that there would be no difficulty with people losing their place in line. These spectators brought their lunches, folding chairs, magazines and newspapers, to occupy themselves while waiting to get into the Court Room.

I believe that any person in Ventura County who reads a newspaper, watches a television set news program, listens to a radio or talks to fellow citizens at the corner coffee shop, is familiar with all the facets of the above entitled case. I fail to see how any person could escape forming an opinion as to what disposition should be made of the case in view of the overwhelming barrage of news coverage of the case. Regardless of how honest and intelligent a person may be or regardless of what a prospective juror may state upon voir dire examination, I believe that practically every person within Ventura County has an opinion concerning the disposition of the entire case, either consciously or subconsciously.

I believe that the cause of this bias and pre-judgment of the case exists for several reasons. I believe that the ball started rolling when law enforcement officers concerned with the investigation of the case, gave press representatives and other representatives of public media, a play by play description of every phase of the investigation. This is set forth in my previous affidavit in the prior application for removal. The District Attorney in his official capacity as a public officer played a vital part in the ignition of the fire of public reaction to the case and to the defendants named above by his highly inflammatory comments, his personal opinions concerning the disposition of the defendants' cases and by constant statements to press representatives. These are referred to in my previous affidavit. Court Room photographs which are a novelty in view of

the existing canons of judicial ethics of the American Bar Association were over-played by newspapers who took advantage of the good faith and honest efforts of the presid-
[fol. 76] ing Judge to be fair to all parties concerned. The press took advantage of the presiding Judge and used such photographs of Court Room procedure to stimulate the morbid curiosity of readers and prospective jurors.

I have found it extremely difficult to obtain any affidavits from persons who will say that they are prejudiced or biased. I have requested of numerous persons to submit affidavits but I have been refused for various reasons. Either the persons stated they were in business and could not financially afford to become involved in a controversial issue, they were fearful of some kind of retaliatory action by law enforcement officers, or they were fearful of having whatever they said misinterpreted and mis-reported and misunderstood. Those persons who did make affidavits introduced in support of the prior application for removal of action filled on January 13, 1959, stated they felt honor bound not to name persons who expressed opinions because it would be a breach of personal confidence and would probably lead to misinterpretation and misunderstanding and loss of friendship. Furthermore, I believe that the word "prejudice" has been so directly associated with race relations that its common every day meaning has a wrongful and dishonest connotation and people will refuse to say they are prejudiced.

I believe that as a result of the accumulation of all matters referred to in this affidavit and the previous affidavit on file in connection with the prior application for removal of the action filed on January 13, 1959, that the defendant Luis Moya cannot receive a fair and impartial trial in the County of Ventura. This is no reflection upon the humanity or morals of the people of the County of Ventura. I have made my home here because I consider the people living here among the finest I have ever known. I believe that I myself would have been prejudiced had I not become
[fol. 77] directly involved in the case.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: April 15, 1959.

Burt M. Henson.

[fol. 78] IN SUPERIOR COURT OF VENTURA COUNTY

Thursday, April 16, 1959. 9:30 O'Clock A.M.

ORDER DENYING MOTION FOR CHANGE OF VENUE AND PLEA OF GUILTY

Deputy District Attorney Woodruff J. Dean and defendant Luis Estrada Moya, with his counsel, Burt M. Henson are present in Court.

Cause comes regularly on at this time for hearing defendant Moy-'s motion for a change of venue.

Said motion is argued by counsel, submitted and by the Court denied.

Thereupon, defendant Moya, by leave of Court, withdraws his plea of not guilty by reason of insanity heretofore entered and enters his plea of guilty of the offense of first degree murder.

Defendant is remanded.

[fol. 79] IN SUPERIOR COURT OF VENTURA COUNTY

Monday, April 20, 1959.

TRIAL

Trial on the penalty issue in the above entitled cause as to defendant Luis Estrada Moya comes on at this time; with this District Attorney and defendant, with his counsel, Burt M. Henson, present.

In chambers, counsel stipulate that defendant's motion for change of venue may be renewed after voir dire without prejudice and without notice and that the Court may inquire of the prospective jurors as to their attitude toward the death penalty prior to being questioned by counsel.

In Court, counsel begin the impanelment of a jury and at the hour of 12:00 o'clock noon a recess is taken until the hour of 1:45 P.M. this date.

1:45 O'Clock P.M.

CR 3200

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

[fol. 80] Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Estrada Moya, with his counsel Burt Henson, present.

Counsel continue with the impanelment of a jury and at the hour of 4:18 P.M., a recess is taken until April 21, 1959, at 10:00 A.M.

Good cause appearing therefor, it is by the Court ordered that the following names be and they are hereby withdrawn from the trial jury box and destroyed: Irene L. Mayse, Camarillo; and A.A. Morrison, Simi.

[fol. 81] IN SUPERIOR COURT OF VENTURA COUNTY

Tuesday, April 21, 1959. 10:00 O'Clock A.M.

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, and defendant Luis Moya, with his counsel present.

Counsel continue with the impanelment of a jury.

It is stipulated that the Court may excuse prospective jurors who are conscientiously opposed to the death penalty without a challenge for cause.

At the hour of 12:00 P.M., a recess is taken until the hour of 2:00 P.M. this date.

2:00 O'Clock P.M., Franklin R. Greene and Esther Bruner, Court Reporters

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this [fol. 82] time, with the District Attorney and defendant Luis Moya, with his counsel, Burt M. Henson present.

Counsel continue with the impanelment of a jury and thereafter a jury consisting of the following 12 persons is regularly impaneled and sworn, to-wit:

Edward F. Hart, Lorraine E. Hanson, Jerry M. Comstock, Mrs. Sabrine Finnerty, Thedore C. Wichman, Mrs. Grance E. Dominy, Mrs. Almena Gayle Caldwell, Evelyn C. De Marco, John F. Miller, James O. Bailey, Orville D. Hernvall and Percy Earl Ball.

Good cause appearing therefore, Mrs. Mary F. Benson is impaneled and sworn as an alternate juror.

The District Attorney makes his opening statement to the jury, whereupon, Sylvia Mary Butler, called by the People, is sworn and testifies.

Photograph of Olga Duncan, in nurse's uniform, is received in evidence as People's Exhibit No. M-1.

Raymond R. Higgins, called by the District Attorney, is sworn and testifies.

Two tape recordings of conversation between defendant Moya and Mr. Higgins are received collectively as People's Exhibit No. M-1. Said recordings, made on December 26, 1958, were played to the jury.

At the hour of 4:30 P.M., the jury and alternate are duly admonished and a recess taken until April 22, 1959, at 10:00 A.M.

[fol. 83] IN SUPERIOR COURT OF VENTURA COUNTY

Wednesday, April 22, 1959. 10:00 O'Clock A.M.

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, the jury and alternate present.

Portions of Mr. Moya's testimony given at the Elizabeth Duncan trial on February 26, 1959, and grand jury hearing on December 26, 1958, are read into the record.

It is stipulated that Mr. Moya was a prosecution witness at the said trial and that questions and answer given at those times are the same as presented to the jury now.

Virgil L. Payton, called by the District Attorney, is sworn and testifies.

A photograph of a curve in the highway, with white station wagon on left and group of men on right, is received in evidence as People's Exhibit M-3.

Photograph of shoulder of road showing marker (Mile 6.9) is received as People's Exhibit M-4.

Photograph of ditch and drain pipe is received as [fol. 84] People's Exhibit M-5.

Photograph of body in grave, with tarpaulin in upper right-hand corner, is received as People's Exhibit M-6.

Another photograph of body in grave is received as People's Exhibit M-7.

Thomas B. Osborne, called by the People, is sworn and testifies.

A .22 caliber J. C. Higgins model 88 revolver, with broken stock is received as People's Exhibit M-8.

A new .22 caliber J. C. Higgins model 88 revolver (serial No. 5244) is received as People's Exhibit M-9.

At the hour of 12:03 P.M., the jury is admonished and a recess taken until the hour of 1:45 P.M. this date.

[fol. 85] 1:45 O'Clock P.M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel, Burt Henson, jury and alternate juror, present.

Mr. Osborne resumes the stand for cross-examination.

Mr. Henson's request to call Mr. Osborne as defense witness at this time is denied.

The jury and all persons under the age of 21 year are excluded while counsel discuss points of law. (Motion picture of administration of death penalty at San Quentin prison is shown the Court at this time)

Upon the return of the jury, defense counsel makes his opening statement.

Mary Locke, called by the defense, is sworn and testifies.

Two photographs of a cafe in La Jolla are marked as defendant's exhibits M-A and M-B, respectively, and thereafter received in evidence.

Joe Samarron, called by defendant, is sworn and testifies.

Photograph of frame house, with car parked at left, is marked as defendant's exhibit M-C and thereafter received in evidence.

[fol. 86] Jesse M. Sestrada, Josephine Estrada Samarron, William Estrada Samarron and Aurelia Cruz, called by the defense, are sworn and testify.

At the hour of 4:07 P.M., the jury and alternate are admonished and a recess taken until April 23, 1959, at 10:00 A.M.

[fol. 87] IN SUPERIOR COURT OF VENTURA COUNTY

Thursday, April 23, 1959. 10:00 O'Clock A.M.

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel, Burt Henson, jury and alternate, present.

A. La Mont Smith, called by the defense, is sworn and testifies.

Parole officer's file No. A 39080 on Luis Moya is received in evidence as defendant's exhibit M-D.

On motion of Mr. Henson, the remarks of the District Attorney are stricken.

Joseph A. Spangier, called by the defendant, is sworn and testifies.

At the hour of 12:00 noon, the jury is duly admonished and a recess taken until the hour of 1:45 P.M. this date.

1:45 O'Clock P.M., Franklin R. Greene, and Esther Bruner, Court Reporters

[fol. 88] CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AND AUGUSTINE MOYA

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel, and jury present.

Mr. Spangler resumes the stand for further direct examination.

Pete C. Gonzales and Agnes Estrada Moya, called by the defense, are sworn and testify.

Tinted photograph of Luis Moya, wearing cap, at age of 3½ years, is marked as defendant's exhibit M-E for identification and thereafter received in evidence.

Group of eight photographs of defendant and friends is marked as defendant's exhibit M-F for identification.

Three photographs of defendant at age 7, 10 and 9, are received as defendant's exhibits M-G, M-H and M-I, respectively.

Defendant's exhibit M-F, heretofore marked for identification, is received in evidence.

Group photograph of Moya family at beach is received as defendant's exhibit M-J.

Photograph of defendant, with "Ray" and "Richie" in surf, as received as defendant's exhibit M-K.

Photograph of defendant, with three other children, on [fol. 89] rubber raft in ocean, is received as defendant's exhibit M-L.

Photograph of defendant, with brother leaning on rubber mat on beach, is received as defendant's exhibit M-M.

Group of ten photographs of defendant as child is received as defendant's exhibit M-N.

Photograph of basket ball team, with defendant in front row at left, is received as defendant's exhibit M-O.

Photograph of Little League baseball team, with defendant in back row (second from right) is received as defendant's exhibit M-P.

Third place ribbon for 75-yard dash in Kawanis Club "Little Olympics" is received as defendant's exhibit M-Q.

Snapshot of defendant, with two friends, standing in front of tree at Gatesville, Texas, is received as defendant's exhibit M-R.

Snapshot of defendant, with mother, at Gatesville, is received as defendant's exhibit M-S.

December 18, 1953, edition of "State School News" is received as defendant's exhibit M-T.

Certified copy of commitment papers of defendant to Texas Youth Development Counsel dated August 6, 1953, is received as defendant's exhibit M-U.

Frank C. Kerr, called by Mr. Henson, is sworn and testifies.

In the absence of the jury, counsel argue points of law, and a tape recording of the voices of Mr. Kerr and [fol. 90] defendant taken January 8, 1959, is marked as defendant's exhibit M-V for identification.

The jury returns and Eloisa Gonzales, called by the defense, is sworn and testifies.

A box of colored slides taken in San Angelo, Texas, is received as defendant's exhibit M-W.

At the hour of 4:30 P.M., the jury is duly admonished and a recess taken until April 24, 1959, at 10:00 A.M.

[fol. 91] IN SUPERIOR COURT OF VENTURA COUNTY

Friday, April 24, 1959. 10:00 O'Clock A.M.

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, and the jury and alternate, present.

Mrs. Gonzales resumes the stand for further direct examination.

Film of scenes of San Angelo, Texas, is received in evidence as defendant's exhibit M-X.

Letter postmarked Jan. 5, 1959, from defendant to Mrs. Gonzales, is received as defendant's exhibit M-Y.

Letter postmarked Feb. 20, 1959, from defendant to Mrs. Gonzales, is received as defendant's exhibit M-Z.

Philip Wesley Thatcher, called by the defense, is sworn and testifies.

The jury is excused while Mr. Henson makes offer of proof, whereupon, the jury returns into Court.

Manuel Sepulveda Ontiveros, called by the defendant, is sworn and testifies.

[fol. 92] In the absence of the jury, a tape recording taken on Feb. 21, 1959, of the voices of defendant and Mr. Ontiveros, is marked as defendant's exhibit M-A1 for identification.

Esperanza Rios, called by the defense, is sworn and testifies.

A tape recording taken March 7, 1959, of a conversation between defendant and Mrs. Rios is marked as defendant's exhibit M-A2 for identification.

It is stipulated that a tape recording taken April 5, 1959, which is marked as defendant's exhibit M-A3 for identification, is a conversation between defendant and Floyd K. Gressett.

The jury returns into Court, whereupon, Thomas B.

Osborne, heretofore sworn, is recalled on behalf of the defendant.

Clarence R. Henderson and Floyd K. Gressett, called by defendant, are sworn and testify.

Both defendant and Rev. Gressett waive the confessor-confessee privileged communication.

Victor J. Segura is regularly sworn as "English-Spanish" interpreter to correctly interprete these proceedings on behalf of Luis Moya, who is sworn and testifies on behalf of the defendant.

Pursuant to stipulation, copy of a report of Charles Spangler, case worker at Gatesville, Texas, is received as defendant's exhibit M-A4.

[fol. 93] Certified copy of defendant's birth certificate is received as defendant's exhibit M-A5.

Copy of Probation Officer's report and committment to State Prison dated Nov. 19, 1956, San Diego County Superior Court file No. 210 055, is received as defendant's exhibit M-A6.

At the hour of 12:07 P.M., the jury is admonished and a recess taken until the hour of 2:00 P.M. this date.

2:00 O'Clock P.M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, jury and alternate, present.

Frank W. Haywood, called by the defense, is sworn and testifies.

Two photographs of the Blue Onion cafe in Santa Barbara are received as defendant's exhibits M-A7 and M-A8, respectively.

Dr. David R. M. Harvey, called by Mr. Henson, is sworn and testifies.

A portion of Dr. Harvey's testimony is stricken on motion of defense counsel.

Myron D. Smith, called by defendant, is sworn and testifies.

[fol. 94] Two photographs of the Virginia hotel in Santa Barbara are received as defendant's exhibits M-A9 and M-A10, respectively.

At the hour of 4:30 P.M., the jury is duly admonished and a recess taken until April 27, 1959, at 10:00 A.M.

[fol. 95] In Superior Court of Ventura County

Monday, April 27, 1959 10:00 O'Clock A. M.

Further Trial

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel, Burt Henson, jury and alternate, present.

At request of defense counsel, the Court orders the Sheriff to produce Ted Dilts in Court at this time.

Ysidro Luna, called by defendant, is sworn and testifies.

A metal bar, bent on one end, is received as People's exhibit M-10.

Ted Dilts, Jack L .Wash and William R. Peacock, called by defense, are sworn and testify.

A portion of Mr. Peacock's testimony is stricken on motion of the District Attorney.

Written motion of Luis Moya to withdraw plea of not guilty, filed in this cause on January 29, 1959, is received as defendant's exhibit M-A11.

Pursuant to stipulation, the written reports of Dr. Donald S. Patterson and Dr. Louis R. Nash are received in evidence [fol. 96] as defendant's exhibit M-A12 and M-A13, respectively.

It is stipulated that "psychopath" and "sociopath" are similar in meaning.

Emma Ann Short, called by the defendant, is sworn and testifies.

A photograph of Elizabeth Ann Duncan is marked as defendant's exhibit M-A14 for identification.

A photograph of Esperanza Esquivel is marked as defendant's exhibit M-A15 for identification and thereafter received in evidence.

At the hour of 11:55 A.M., the jury is admonished and a recess taken until the hour of 1:45 P.M. this date.

In the absence of the jury, Mr. Henson makes an offer of proof.

1:45 O'Clock P.M.

CR 3220

THE PEOPLE, etc.

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, jury and alternate, present.

Refugio Garcia, Jr., called by the defense out of order, is sworn and testifies.

Mrs. Short resumes the stand for further direct examination.

[fol. 97] A large photograph of Augustine Baldonado is marked as defendant's exhibit M-A16 and thereafter received in evidence.

Defendant's exhibit M-A14, heretofore marked for identification, is received in evidence at this time.

Esperanza Esquivel, called by the defense, is sworn and testifies.

Two photographs of the Tropical cafe are marked as defendant's exhibits M-A17 and M-A18, respectively, and thereafter received in evidence.

Certified copy of California Department of Alcoholic Beverage Control file No. 15715 is marked as defendant's exhibit M-A19 for identification.

Luis Estrada Moya, Jr., called by his counsel, is sworn and testifies.

Three snapshots of scenes of business section of City of San Diego are received as defendant's exhibits M-A21,

M-A22 and M-A23, respectively, following the introduction of a series of four pictures of same business section as defendant's exhibit M-A20.

At the hour of 4:30 P.M., the jury is duly admonished and a recess taken until April 28, 1959, at 10:00 A.M.

[fol. 98] IN SUPERIOR COURT OF VENTURA COUNTY

Tuesday, April 28, 1959. 10:00 O'Clock A.M.

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, jury and alternate, present.

Luis Estrada Moya resumes the stand for further direct examination.

The jury is excused while defense counsel makes offer of proof.

The jury returns and Mr. Moya resumes the stand.

The District Attorney's motion to strike a portion of Mr. Moya's testimony is by the Court granted.

At the hour of 12:00 o'clock noon, the jury is admonished and a recess taken until the hour of 1:45 P.M. this date.

1:45 O'Clock P.M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

[fol. 99] Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, jury and alternate, present.

Mr. Moya resumes the stand for further cross-examination.

Both parties rest.

Mr. Henson's motion to allow defense counsel to open and close the argument is denied.

Respective counsel begin their arguments to the jury.

A portion of Mr. Henson's argument is stricken on motion of the District Attorney.

At the hour of 4:45 P.M., the jury is admonished and a recess taken until April 29, 1959, at 10:00 A.M.

[fol. 100] Wednesday, April 28, 1959. 10:00 O'Clock A.M.

Present: Hon. Chas. F. Blackstock, Judge of the Superior Court, County of Ventura, Robert L. Hamm, Clerk, By Wm. R. Peacock, Deputy Clerk, William E. Hill, Sheriff, Esther Bruner, Court Reporter.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, jury and alternate, present.

Mr. Henson concludes his argument on behalf of the defendant, whereupon, the District Attorney commences his closing argument.

At the hour of 12:02 P.M., the jury is admonished and a recess taken until the hour of 1:45 P.M. this date.

1:45 O'Clock P.M. and Esther Bruner, Court Reporter

CR 3220

THE PEOPLE, etc.

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, and the jury, present.

[fol. 101] The District Attorney concludes his closing argument, the Court instructs the jury and at the hour of 2:45 P.M., the jury retires in charge of the bailiff to consider its verdict.

At the hour of 5:40 P.M., the jury and alternate return into Court.

5:40 O'Clock P.M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel, Burt Henson, jury and alternates, present.

The Court inquires the jury if they have agreed upon a verdict and the jury foreman states that they have not agreed upon a verdict.

Thereupon, at the request of the jury, the testimony of Dr. David R. M. Harvey is read back to the jury.

At the hour of 7:10 P.M., the jury again retires in charge of the bailiff.

It is stipulated that Mrs. Grace E. Dominy may be separated from the jury while enroute to dinner.

The jury returns into Court at the hour of 9:45 P.M.

[fol. 102] 9:45 O'Clock P.M.

CR 3220

THE PEOPLE, etc.,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

FURTHER TRIAL

Trial of the above entitled cause is resumed at this time, with the District Attorney, defendant Luis Moya, with his counsel Burt Henson, jury and alternate, present.

The Court inquires of the jury if they have agreed upon a verdict and the foreman states that they have agreed upon a verdict, to wit:

(It is stipulated that verdict may be read back before it is recorded)

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendant

VERDICT

Death

We, the jury impaneled to try the above-entitled cause fix the penalty of the defendant Luis Estrada Moya for the murder in the first degree of Olga Duncan at death.

Dated this 29 day of April, 1959.

John F. Miller, Foreman of the Jury".

[fol. 103] The jury is polled and each juror states that said verdict is his or her verdict.

The jury and alternate are thereupon discharged.

Cause is continued until May 7, 1959, at 9:30 A.M. for pronouncing judgment.

Defendant is remanded.

[fol. 104] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendants.

VERDICT

Death

We the jury impaneled to try the above-entitled cause fix the penalty of the defendant LUIS ESTRADA MOYA for the murder in the first degree of Olga Duncan at death.

Dated this 29 day of April, 1959.

John F. Miller, Foreman of the Jury.

[fol. 105] IN SUPERIOR COURT OF VENTURA COUNTY

Thursday, May 7, 1959. 9:30 o'clock A.M.

ORDER DENYING MOTION FOR NEW TRIAL

The District Attorney and defendant Luis Moya, with his counsel, Burt M. Henson, are present. Cause comes on at this time for further proceedings.

Defense counsel moves the Court for a new trial under the provisions of Section 1181 (5) and to exercise its power under Section 1181 (7) of the Penal Code, where-

upon, said motions are argued by respective counsel and by the Court denied.

Thereupon, the following proceedings were had:

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THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

JUDGMENT ON CONVICTION

District Attorney Roy A. Gustafson and the defendant Luis Estrada Moya, with his counsel Burt M. Henson, are [fol. 106] present in Court. The above entitled cause comes regularly on at this time for pronouncing judgment against the defendant.

The defendant having heretofore entered his plea of guilty of the offense of murder in the first degree, and a jury having fixed the penalty at death, he is duly arraigned for judgment, shows no legal cause why judgment should not be pronounced against him, and it is therefore ordered, adjudged and decreed that the said defendant be punished by being put to death by the administration of a lethal gas.

It is further ordered, adjudged and directed that the said defendant be taken by the Sheriff of the County of Ventura to the Director of Corrections at San Quentin, California.

The defendant is remanded to the custody of the Sheriff.

[fols. 107-111a] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

CR 3220

Date: May 7, 1959

Judge: Hon. Chas. F. Blackstock

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO

JUDGMENT ON CONVICTION

District Attorney Roy A. Gustafson and the defendant Luis Estrada Moya with his counsel Burt M. Henson are present in Court. The above entitled cause comes regularly on at this time for pronouncing judgment against the defendant.

The defendant having heretofore entered his plea of guilty of the offense of murder in the first degree, and a jury having fixed the penalty at death, he is duly arraigned for judgment, shows no legal cause why judgment should not be pronounced against him, and it is therefore ordered, adjudged and decreed that the said defendant be punished by being put to death by the administration of a lethal gas.

It is further ordered, adjudged and directed that the said defendant be taken by the Sheriff of the County of Ventura to the Director of Corrections at San Quentin, California.

The defendant is remanded to the custody of the Sheriff.

STATE OF CALIFORNIA,
County of Ventura, ss:

I, Robert L. Hamm, County Clerk of the County of Ventura, State of California, and ex-officio Clerk of the Superior Court therein, hereby certify that the foregoing is a full, true and correct copy of the Order duly made and entered in the minutes of said Superior Court in the above entitled cause and that I have compared the same

with the original, and that the same is a correct transcript therefrom and of the whole thereof.

Attest my hand and the seal of said Superior Court this 7th day of May, 1959.

Robert L. Hamm, County Clerk. By Wm. R. Peacock, Deputy Clerk.

[fol. 111b] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA

CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendant

STATE OF CALIFORNIA,
County of Ventura, ss:

I, Charles F. Blackstock, Judge of the Superior Court of the State of California, in and for the County of Ventura, hereby certify that the foregoing Transcript, pages 1 to 111 inclusive, in the above proceedings is true and correct, and that the same is now, therefore, approved by me, this 29th day of June, 1959.

Chas. F. Blackstock, Trial Judge.

[fol. a] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA.

Honorable Charles F. Blackstock, Judge

No. CR-3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

ELIZABETH ANN DUNCAN, LUIS ESTRADA MOYA and AUGUSTINE BALDONADO, Defendant

Reporter's Transcript

[fol. 1] IN SUPERIOR COURT OF VENTURA COUNTY

Ventura, California, December 30, 1958. 9:30 o'clock A.M.

COLLOQUY BETWEEN COURT AND COUNSEL RE APPOINTMENT OF COUNSEL AND ARRAIGNMENT

The Court: People versus Elizabeth Ann Duncan——

Mr. Gustafson: Ready for the People.

The Court: —Luis Estrada Moya and Augustine Baldonado.

Mr. Gustafson: Ready for the People, your Honor.

Mr. Sullivan: I represent the defendant, Elizabeth Duncan, your Honor, Ward Sullivan.

Mr. Gustafson: This matter comes on at this time by reason of an indictment having been presented by the Grand Jury of Ventura County.

The defendant Elizabeth Ann Duncan is present in court with her attorney, S. Ward Sullivan. The defendants Luis Estrada Moya and Augustine Baldonado are present in court. I do not believe that they are represented by counsel, your Honor.

The Court: Mrs. Duncan—oh, Mrs. Duncan is represented by Mr. Sullivan.

Mr. Sullivan: Yes, your Honor.

The Court: Is she in the courtroom?

Mr. Gustafson: Yes, your Honor.

Mr. Sullivan: Stand up.

The Court: These three people are charged jointly, are they not?

[fol. 2] Mr. Gustafson: Yes: your Honor.

The Court: All right, Mr. Moya and Mr. Baldonado, stand up. Mrs. Duncan, stand up.

You and each of you are entitled, in the first place, to be represented by an attorney. Apparently Mrs. Duncan is represented by Mr. Sullivan, an attorney of this court, but you two, Mr. Moya and Mr. Baldonado, apparently are not represented by a lawyer; is that right?

Defendant Baldonado: That's right. That's true.

The Court: Do you, or either of you, have any money or property with which to employ an attorney?

Defendant Baldonado: No, I don't.

Defendant Moya: No.

The Court: You want the Court to appoint a lawyer to defend you?

Defendant Baldonado: Yes, your Honor.

Defendant Moya: Yes.

The Court: Shall I appoint one lawyer to defend both of them, do you think?

Mr. Gustafson: I don't think that would be appropriate, your Honor. There may be a conflict of interest here and I would suggest one attorney for each defendant.

The Court: Who are the next on the list?

The Clerk: Mr. John Danch is next on the list. Next after that is Nagao Fujita.

The Court: Well, Mr. Baldonado, Mr. John Danch, an [fol. 3] attorney of this court, is appointed to act as your attorney.

And you say Fujita?

The Clerk: Mr. Nagao Fujita.

The Court: Nagao Fujita——

The Clerk: Yes, sir.

The Court: —is appointed to defend Mr. Moya. The further arraignment of these two should be deferred until Thursday morning until they have an opportunity to consult their attorneys, shouldn't they?

The Clerk: Mr. Danch is present, your Honor.

Mr. Danch: I am present in court, your Honor. I think that perhaps the matter might as well be continued for a week.

Mr. Gustafson: Yes, Thursday is a holiday, your Honor.

The Court: What?

Mr. Gustafson: Thursday is a holiday, anyway.

The Court: Oh, yes.

Mr. Danch: It is a lengthy transcript.

The Clerk: January the 6th, your Honor.

Mr. Danch: Mr. Fujita in the meantime can examine the transcript, too, and will be ready on next Tuesday.

Mr. Sullivan: May I be heard on that date, your Honor? I have a matter in Department 44 of the Superior Court in Los Angeles at 9:00 o'clock in the morning on the 6th of January. I could be here in the afternoon, if that would not inconvenience this Court.

The Court: Sixth day of January, what day is that?

[fol. 4] Is that on a Tuesday? Is that on a Tuesday or Thursday?

The Clerk: Tuesday, your Honor.

Mr. Sullivan: Tuesday, your Honor.

The Court: Tuesday.

Mr. Danch: That would be satisfactory with me, your Honor, to have it in the afternoon.

The Court: Does that suit you, Mr. District Attorney?

Mr. Gustafson: Yes, your Honor.

The Court: What time in the afternoon?

Mr. Sullivan: Any time that is convenient to your Honor's calendar.

Mr. Gustafson: One-thirty, your Honor?

The Court: Better make it 2:00 o'clock, I think, January 6th. The matter as to all three of these defendants will go over until January 6th at 2:00 o'clock.

Mr. Gustafson: Well, is that, as I understand it, Mr. Sullivan, in accordance with your desires and the desire of your client?

Mr. Sullivan: That is in accordance with my desire and the desire of my client.

The Court: Of course, we could arraign Mrs. Duncan now.

Mr. Gusfafson: Yes. That is why I asked Mr. Sullivan whether he requested that the matter go over before arraignment.

The Court: I think I will arraign Mrs. Duncan now.

Mrs. Duncan, is your true name Elizabeth Ann Duncan?

[fol. 5] Defendant Elizabeth Ann Duncan: Yes, it is.

The Court: And you are represented by Mr. Sullivan, an attorney of this court?

Defendant Elizabeth Ann Duncan: Yes, I am.

The Court: You have a right to a jury trial, to the process of the court for the purpose of bringing in witnesses to testify in your behalf, and you have a right to reasonable continuance.

Mr. Sullivan, do you waive the reading of the indictment?

Mr. Sullivan: We waive the reading of the indictment, your Honor.

The Court: Hand her a copy.

Mr. Sullivan: And ask that the matter go over until the 6th of January at 2:00 P.M. for plea.

Mr. Gustafson: No objection, your Honor.

The Court: All right, remanded.

Mr. Sullivan: Your Honor, is there another indictment against Mrs. Duncan?

The Clerk: Yes, there is, your Honor, the next case.

The Court: What did he say?

The Clerk: He asked if there was another indictment against her and there is, the next case.

The Court: Another indictment against her?

The Clerk: Yes.

The Court: Well, that doesn't include the other.

The Clerk: The other two matters were continued until [fol. 6] Tuesday, December——

The Court: We might as well arraign her on this other indictment, hadn't we?

Mr. Gustafson: Yes, your Honor. That is the next case.

The Court: You say your true name is Elizabeth Ann Duncan?

Defendant Elizabeth Ann Duncan: That's right.

The Court: This is in Case Criminal 3218 now.

Mr. Sullivan: We will waive the statement of her constitutional rights and the reading of the indictment, your Honor.

The Court: All right.

Mr. Sullivan: We will ask that the plea on this indictment also be continued until January the 6th at 2:00 P.M.

The Court: All right, that's the order, over until January 6th at 2:00 P.M.

All right, these three defendants are remanded to the sheriff.

[fol. 7] Ventura, California, December 30, 1958. 3:30 o'clock P.M.

COLLOQUY BETWEEN COURT AND COUNSEL RE SUBSTITUTION OF ATTORNEYS

The Court: All right, People versus Moya.

Mr. Fujita: If it please the Court, your Honor, the defendant Luis Moya is present in court. I was appointed this morning to represent him in the matter of the People versus Duncan, et al.

The Court: Yes, you were appointed to defend Mr. Moya.

Mr. Fujita: That is correct, your Honor.

The Court: As I understand it, you now desire to withdraw?

Mr. Fujita: That is correct, your Honor.

The Court: Your withdrawal is entirely satisfactory to Mr. Moya; isn't that right?

Defendant Moya: Yes, sir, it is.

The Court: All right, you are permitted to withdraw.

Mr. Fujita: Thank you very kindly.

The Court: I will have to appoint somebody else. I think I will appoint somebody at large, regardless of who is next on the list. The one I appoint may not want to serve, too, I don't know, but, in any event, I am going to appoint Mr. Bert Henson.

The Clerk: It was originally continued over to January 6th, 2:00 P.M.

The Court: Over to January 6th, 2:00 P.M. Notify Mr. [fol. 8] Henson.

The Clerk: Right away.

The Court: All right, court is adjourned.

[fol. 9] Ventura, California, January 6, 1959. 2:00 o'clock P.M.

COLLOQUY BETWEEN COURT AND COUNSEL RE ARRAIGNMENT AND SETTING CASE FOR TRIAL

The Court: You will have to be quiet in the courtroom or I will have to clear the courtroom.

People versus Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado.

Mr. Gustafson: Ready for the People, your Honor.

Mr. Henson: Ready for Defendant Moya, your Honor.

Mr. Danch: Ready for Defendant Baldonado.

Mr. Sullivan: Ready for Defendant Duncan, your Honor.

The Court: And the defendants are all in court, are they not?

Mr. Henson: Yes, Defendant Moya is present in court, your Honor.

Mr. Sullivan: Mrs. Duncan is in court, your Honor.

The Court: Mrs. Sullivan—Mrs. Duncan is represented by Mr. Sullivan, isn't it?

Mr. Sullivan: Yes, your Honor.

The Court: And Moya by Mr. Henson?

Mr. Henson: That's right.

The Court: And Baldonado by Mr. John Danch.

Mr. Danch: That is correct, your Honor.

The Court: And their respective attorneys are also all in court.

The Clerk: You want them to stand up, Judge?

[fol. 10] The Court: Well, when I get ready to arraign them I do.

This is just for an arraignment, is it not?

Mr. Gustafson: Yes, your Honor, arraignment and plea.

Mr. Sullivan: Mrs. Duncan has already been arraigned. She is up before the Court today for plea, as I understand it.

The Court: That is the way I understand it. Is that right?

The Clerk: That is correct.

The Court: Mrs. Duncan has been fully arraigned, has she not?

Mr. Gustafson: Yes, your Honor, she has been, I believe, if it is considered that her counsel's waiving of the admonition of her Constitutional rights is proper and if his waiver of the reading of the indictment to her is proper.

The Court: Well, anyway, I will arraign all of them again so there won't be any question about it.

The defendants will all stand up.

Well, in the first place, you and each of you are entitled to be represented by an attorney. Mr. Moya, you are represented by Mr. Burt Henson, an attorney of this court. Mr. Baldonado, you are represented by Mr. John Danch, an attorney of this court. And Mrs. Sullivan, you are represented—Mrs. Duncan, you are represented by Mr. Sullivan, an attorney of this court.

You each of you, as you have been told before, and you [fol. 11] are being told now, are entitled to be represented by an attorney and each of you is represented by an attorney.

You and each of you have a right to a jury trial and to the process of the court for the purpose of bringing in witnesses to testify in your behalf, and you have a right to a reasonable continuance, if you want it, so that you can consult your friends and relatives, if you desire to do so.

Now, this is the time to enter a plea, is it not?

Mr. Gustafson: I think the indictment should be read.

The Court: The reading of the indictment has been waived, but I will have the Clerk read the indictment.

(Indictment read by Clerk.)

The Court: Now, Mrs. Elizabeth Ann Duncan, is that your true name?

Defendant Elizabeth Ann Duncan: Yes, it is.

The Court: All right, to the indictment how do you plead, guilty or not guilty?

Defendant Elizabeth Ann Duncan: Not guilty.

The Court: Enter the plea of not guilty.

Mr. Sullivan: Your Honor——

The Court: Of Elizabeth Ann Duncan.

Mr. Sullivan: Your Honor, as far as the defendant, Elizabeth Ann Duncan, is concerned, I wish to enter an additional plea of not guilty by reason of insanity.

The Court: All right, note the plea also of not guilty by reason of insanity as far as Elizabeth Ann Duncan is concerned.

[fol. 12] Now, Mr. Luis Estrada Moya——

Mr. Henson: Your Honor, in that matter, this is my first appearance with this defendant, and since this is a case of such detail, I haven't had a chance to investigate the matter thoroughly. I would like to ask for an additional week in which to enter a plea.

The Court: All right, you are entitled to a continuance if you want it.

Mr. Henson: I so move.

The Court: A week from today?

Mr. Henson: Yes, at 9:30 in the morning on the regular calendar, or whatever time is convenient for the Court.

The Court: All right, so far as Moya is concerned the matter goes over until a week from today. What day will that be?

The Clerk: January the 13th at 9:30, your Honor.

The Court: January 13th, 19——

The Clerk: '59.

The Court: '59 at 9:30.

Mr. Henson: Thank you very much.

The Court: Now, Mr. Baldonado——

Mr. Danch: I request also, your Honor, a continuance of one week to plead.

The Court: You want it a week over, too?

Mr. Danch: Yes.

The Court: All right, the case goes over one week also [fol. 13] for Mr. Baldonado, one week from today at 9:30. That will be January the 13th.

Mr. Gustafson: Now, with respect to Elizabeth Ann Duncan, your Honor, I ask that the matter be set for trial.

Mr. Sullivan: Your Honor, before we come to the matter of a trial date, I have a motion which I would like to file in this matter, which is a motion for a change of venue, together with an affidavit in support thereof.

May the record show that I am handing the District Attorney a copy of that motion, together with a copy of the affidavit in support thereof, and also handing to counsel for each of the co-defendants a copy of the motion and affidavit in support thereof.

I don't know whether the District Attorney will desire to file any counteraffidavits. If he does, I have no objection to this motion going over for argument to the 13th, when the matter of the co-defendants goes over for plea. Whatever meets the desire of the Court and the District Attorney in that respect.

The Court: How do you feel about that, Mr. District Attorney?

Mr. Gustafson: Your Honor, I don't think there is presently any motion properly before the Court. According to the Penal Code, the defendant must make his application in open court in writing, and I assume that defendant's counsel believes that he has done this, but the applica- [fol. 14] tion made in open court and in writing must have been served one day in advance on the District Attorney.

If this now a purported application for change of venue under the provisions of the Penal Code, I ask that it be peremptorily denied for not complying with the Code.

Mr. Sullivan: Well, if counsel is objecting to having been served today, I will reserve him and notify him now that I will renew that motion on the 13th and he will be served in ample time.

The Court: All right. In any event, the motion as filed is denied without prejudice.

Mr. Sullivan: Very well, your Honor.

The Court: That is all right? That suits you?

Mr. Sullivan: That is satisfactory, your Honor.

Mr. Gustafson: Now, your Honor, the matter of setting the date for trial is still before the Court. Her plea has been entered today. According to the Code, the trial should be set within 30 days.

The Court: What date can we get? Where is Mabel?

The Calendar Clerk: What date do you suggest? We will change the calendar.

Mr. Sullivan: I was going to suggest this, your Honor, as far as my calendar is concerned, a date sometime about the middle of February. I realize that that is beyond the 30-day period, but we are willing to waive our right to be brought to trial within the 30 days.

[fol. 15] Your Honor realizes the seriousness of the charges contained in this indictment and I think that we should be entitled to a little more time than the 30 days to prepare this case for trial.

Mr. Gustafson: I wouldn't have any objection, your Honor, if the defendant, Mrs. Duncan, personally waives the 30-day period to set it for trial starting February 9th.

Mr. Sullivan: How about starting Monday the 15th or the 16th of February?

The Court: Mrs. Duncan, for the record, you waive the requirement that the trial be had within 30 days?

Defendant Elizabeth Ann Duncan: Yes.

The Court: She says "Yes."

Mr. Sullivan: I will join in that waiver.

The Court: And you, Mr. Sullivan, you waive the time?

Mr. Sullivan: Yes, I join.

The Court: When do you want it set then?

Mr. Sullivan: I would suggest the 16th of February, if it is agreeable.

The Court: Sixteenth day of February, 10:00 o'clock, with a jury. Very well.

Is that satisfactory to you?

Mr. Henson: Well, your Honor, I would prefer to have it later myself for this reason, that there seems to be a great deal of prejudice by at least the people in this courtroom, apparently, as I listened to the "oh's" and "ah's" on [fol. 16] Mrs. Duncan's plea. And I feel that to do justice to the defendants here that the matter should be set a little bit later until maybe some of the hysteria will die down. I

would prefer to have it sometime about the middle of March, since I assume that——

Mr. Gustafson: Well, of course, your honor, defendants Moya and Baldonado have not yet even pleaded and there is no occasion for Mr. Henson's——

The Court: I know they haven't, but you ultimately would want the trial at the same time, wouldn't you?

Mr. Gustafson: Oh, yes, but the matter has been continued only one week now for plea. I assume that if the defendants plead not guilty, it will be certainly time enough now with this advanced knowledge that Mr. Henson and Mr. Danch have, that the matter be tried February 16th. That is already an extension over the 30-day period which the law prescribes. I don't see that any request for extending it much further beyond that is justified at all.

Mr. Danch: The 30-day period, your Honor, is for the defense, for the benefit of the defendant, not for the benefit of the prosecution.

Mr. Gustafson: No, your Honor, I beg to differ. It is not. The Code specifically so provides that the People of the State of California are entitled to an early trial.

Mr. Sullivan: We have no objection to the later date, your Honor, if it will accommodate counsel for the co-defendants.

[fol. 17] Mr. Danch: I suggest, your Honor, that the trial date, the setting of a trial date be continued to next week when all three defendants will have entered their pleas and then pick a date.

Mr. Henson: I think that would be——

The Court: Well, I think the 16th day of February is late enough, anyway. That is beyond the time required by law.

The trial is set for February 16th.

There is nothing further, is there?

Mr. Gustafson: Yes, there is something further, your Honor, by reason of the plea of the defendant Duncan that she is not guilty by reason of insanity. I ask the Court to appoint at least two alienists under the provisions of the Penal Code to examine her with respect to her sanity. I would suggest——

The Court: All right, Dr. Nash and Dr. May, is that satisfactory to you, Mr. Sullivan?

Mr. Sullivan: Nash and who?

The Court: May, M-a-y.

Mr. Sullivan: I am not acquainted with either one of those gentlemen, your Honor, but if——

The Court: They are at the Camarillo State Hospital. They are psychiatrists at the Camarillo State Hospital.

Mr. Sullivan: That is satisfactory, your Honor. It may be, and sometimes happens, that doctors disagree in their reports. I assume that if the doctors should disagree, that [fol. 18] the Court would want to then appoint a third doctor.

The Court: That is, if they should disagree?

Mr. Sullivan: Yes, your Honor.

The Court: Well, that would be time enough to do that when they disagree.

All right, anything further?

Mr. Gustafson: With respect to the number of prospective jurors, your Honor, this being a capital case in which each side is entitled to 20 peremptory challenges, and by virtue of the fact that there are three defendants, five additional challenges on each side for the additional defendants, that will make a total of 60 peremptory challenges, let alone challenges for cause, of which one would expect many in a capital case because of the death penalty issue, I would suggest that a panel of at least 150 prospective jurors be drawn.

The Court: How many?

Mr. Gustafson: At least 150.

Mr. Sullivan: Your Honor; as far as the peremptories are concerned in a case of this nature, the 20 peremptories must be exercised jointly, but in view of the fact that it is a possible capital offense, it is my understanding that each defendant is allowed an additional 10 instead of five. I think it is five where the offense is not punishable by death.

The Court: Well, in any event, you suggest 150?

Mr. Gustafson: At least.

[fol. 19] The Court: That is what I say, but you suggest 150. I think there should be more than 150.

What is your idea, Mr. Sullivan.

Mr. Sullivan: Well, there is a possible hundred peremptory challenges, 50 on each side.

The Court: What is your suggestion?

Mr. Sullivan: Well, your Honor, I am something of a

stranger here in your community up here. I think that probably we should have at least about 300 available. I don't think that they ought to all be called the first day. I think that it will take us some time to pick a jury in this case.

The Court: I think 200 is enough, Mr. Sullivan. Two hundred ought be enough.

Mr. Sullivan: That is my judgment in the matter, your Honor.

The Court: All right, 200 names for the jury.

Mr. Gustafson: Now, your Honor, I would ask that Mrs. Sullivan be arraigned on the other indictment—I mean Mrs. Duncan, excuse me.

The Court: Well, Mrs. Duncan, you have the same rights under this indictment that you had on the other one. You have the right to be represented by an attorney and I take it that on this indictment you are represented by Mr. Sullivan.

Mr. Sullivan: That's right, your Honor. We will waive the statement of her Constitutional rights and waive the reading of the indictment.

[fol. 20] The Court: But, in any event, I think I better arraign her fully, Mr. Sullivan.

Mr. Sullivan: Very well, your Honor.

The Court: You have a right to be represented by an attorney. You have a right to a jury trial and to the process of the court for the purpose of bringing in witnesses to testify in your behalf, and you have a right to a reasonable continuance.

What do you want to do about that? You have a right to a reasonable continuance. Read the indictment.

Mr. Sullivan: We are ready to plead on this indictment, your Honor.

The Court: I know, but read the indictment.

The Clerk: They have waived it. Shall I read it, anyway?

The Court: I understand that, but read the indictment.

(Indictment read by Clerk.)

The Court: Well, Mrs. Duncan, to that indictment, a copy of which has just been handed to you, how do you plead? Guilty or not guilty?

Mr. Gustafson: There are four counts.

The Court: Well, to Count I, how do you plead? Guilty or not guilty?

The Defendant: Not guilty.

The Court: Not guilty?

The Defendant: Not guilty.

The Court: How do you plead as to Count II?

[fol. 21] The Defendant: Not guilty.

The Court: How do you plead as to Count III?

The Defendant: Not guilty.

The Court: How do you plead as to Count IV?

The Defendant: Not guilty.

Mr. Sullivan: As to each of those counts, your Honor——

The Court: Enter the plea not guilty as to all four counts.

Mr. Sullivan: As to each of those counts, your Honor, we enter the additional plea of not guilty by reason of insanity.

The Court: As to each count?

Mr. Sullivan: Yes, your Honor.

The Court: All right, Mr. Sullivan, I think upon second thought that I will compromise with you and order 250 names for jury.

Mr. Sullivan: Very well, your Honor.

The Court: Two hundred and 50 names will be called for the jury.

Mr. Gustafson: Now, your Honor, there will have to be alienists appointed for the not guilty by reason of insanity plea on this indictment, and I would suggest that the same doctors be appointed as were appointed in the murder indictment.

Mr. Sullivan: That is satisfactory.

The Court: All right, Dr. Nash and Dr. May are appointed.

[fol. 22] Mr. Gustafson: And may we at this time, your Honor, have the matter of this case set for trial?

The Court: All right.

Mr. Gustafson: I would suggest with respect to this case that the matter could possibly be tried in three weeks.

Mr. Sullivan: I can't try this case within three weeks, your Honor. I am going to be preparing this murder case for trial and I think that this case should follow the murder case in fairness to this defendant.

The Court: The murder case is set for February the 16th, isn't it?

Mr. Sullivan: Yes.

The Clerk: That is correct.

The Court: This case ought to follow that.

Mr. Gustafson: Well, as far as I am concerned, I think that this case is much less complicated and could be tried within the next three weeks.

The Court: That is, this case itself, not just the question of insanity?

Mr. Gustafson: No, I am talking not about the insanity. I am talking about the case——

The Court: About the indictment itself?

Mr. Gustafson: —on which she was just arraigned with the four counts, No. CR-3218.

The Court: When do you want to try it?

Mr. Gustafson: I would suggest January 26th, your [fol. 23] Honor.

Mr. Sullivan: Your Honor, I think, as I pointed out before, I am going to be busy preparing this murder case for trial. I have matters on my trial calendar in Los Angeles that are going to take up part of my time, not all of it. I think in fairness to this defendant that this case should follow the trial of the murder case, and I am going to ask that the case be set subsequent to the date on which the murder indictment is set for trial.

Mr. Gustafson: Your Honor, may I think about that a moment and see whether I have any objection to having it follow the muder case?

Mr. Sullivan: You can set it for the same day and let it trail, if you want.

Mr. Gustafson: I will accede to the suggestion of counsel that this case be tried subsequent to the murder case.

The Court: All right, what date can we have?

The Calendar Clerk: Monday, March 23rd.

Mr. Gustafson: That is satisfactory tentatively.

Mr. Sullivan: That is satisfactory.

The Court: What is the date?

The Calendar Clerk: Monday, March 23rd.

The Court: March 23.

Mr. Gustafson: Now, on this one I want——

The Court: March 23.

Mr. Gustafson: Twenty-three?

[fol. 24] The Court: 10:00 o'clock.

Mr. Gustafson: —Mrs. Duncan to expressly waive an also her counsel to expressly waive the time of trial an agree that this is a satisfactory date.

The Court: Is that right, Mr. Sullivan?

Mr. Sullivan: That is correct, your Honor.

The Court: Mrs. Duncan?

The Defendant: Yes.

The Court: All right, she said yes and her attorne says they will waive time.

The Calendar Clerk: What number of jurors should b summoned for this case?

The Court: This will be a jury, too?

Mr. Gustafson: Yes. Fifty jurors.

The Court: That ought to be enough in this case, 5 jurors.

Anything further?

Mr. Gustafson: That's all, your Honor.

The Court: All right, the three defendants are remanded Court is adjourned.

[fol. 25] Ventura, California, January 13, 1959. 9:0 o'clock A.M.

The Court: People versus Luis Estrada Moya an Augustine Baldonado.

Mr. Gustafson: Ready for the People, your Honor.

Mr. Henson: Ready for the defendant Moya, your Honor

Mr. Danch: Ready for the defendant Baldonado.

Mr. Henson: Defendant Moya is present in court at thi time.

Mr. Danch: Defendant Baldonado is present.

The Court: You say they are both in court?

Mr. Henson: Yes, Defendant Moya is standing besid me at the present time, your Honor. This is the time fo further arraignment and entry of plea.

The Court: Well, I thought he was fully arraigned.

Mr. Henson: Yes, he was, your Honor.

Mr. Danch: Ready to plead.

Mr. Henson: Ready to plead at this time.

The Court: This is the time for plea. Are you read to plead at this time?

Mr. Henson: Yes, your Honor. Insofar as defendan

Moya is concerned, he enters a plea of not guilty and not guilty by reason of insanity.

Mr. Gustafson: Your Honor, the plea must be entered by the defendant in person.

[fol. 26] The Court: All right, I was asking the defendant, himself. Mr. Henson entered the plea.

What is your plea, Mr. Moya?

PLEA OF NOT GUILTY AND NOT GUILTY BY REASON OF INSANITY (MOYA)

Defendant Moya: I plead not guilty and not guilty by reason of insanity.

The Court: All right, note the plea.

Mr. Henson: Insofar as the appointment of alienists to examine the defendant as court experts, your Honor, I would suggest that only one alienist from the Camarillo State Hospital be appointed since we have found from experience that when there are two, that there has been little disagreement between them since they apparently work together on the case, and I would suggest that either Dr. May or Dr. Nash, or whoever is at the Camarillo State Hospital, be appointed as one expert and that Dr. Harvey, who has been appointed many times by this Court as an expert, also be appointed to get a different viewpoint, and I have been informed that a Dr. Donald Patterson of Santa Barbara who is customarily appointed by the Santa Barbara courts in cases such as this, and I think it is important that there be three different viewpoints on this case, and I would suggest that those three be appointed.

The Court: Because they have different psychiatrists, what assurance is there that they have different viewpoints? They might all view it the same way.

Mr. Henson: Well, they might, but there is more likelihood that three people from different areas, different back-[fol. 27] grounds, are going to view it a little bit differently and I don't see why there should be any objection to it, myself.

The Court: I am not making any objection to it. I am just commenting on the idea.

Mr. Henson: Oh.

The Court: About your remarks about the different viewpoints.

Mr. Henson: I think your Honor will agree that three people in different areas are more likely to disagree or see things differently than two people employed by the same institution.

The Court: Well, the Court won't be looking for somebody that will disagree. The Court will be looking for somebody who will give his honest opinion, whatever it happens to be.

Mr. Henson: That's right. That's all we are looking for, too.

The Court: What do you have to say, Mr. District Attorney?

Mr. Gustafson: Well, I don't know Dr. Patterson, but if Mr. Henson represents that he is a qualified psychiatrist, I have no objection to his appointment nor to the appointment of only one from the State Hospital at Camarillo nor to the appointment of Dr. Harvey, except that I make the representation to the Court and to counsel, if counsel wants to accept the appointment of Dr. Harvey under the circumstances, that I have heretofore talked to Dr. Harvey [fol. 28] on the telephone with respect to employing him as my alienist in the event that the defendants pleaded not guilty by reason of insanity. I am willing to forego my employment of Dr. Harvey and have him as a Court-appointed expert, provided that that is acceptable to the defendants.

Mr. Henson: That is acceptable to me as far as defendant Moya is concerned.

Mr. Danch: As to the question of Dr. Harvey, has he done any work at all so far as the case is concerned?

Mr. Gustafson: Yes, he has, not with respect to these two defendants, but with respect to Mrs. Duncan.

Mr. Danch: We have no objection to Dr. Harvey.

The Court: Well, I know Dr. Patterson. He is a competent alienist, I think, psychiatrist. Dr. Nash will be appointed, for one and Dr.—you suggested Dr. Harvey yourself, didn't you?

Mr. Henson: That is correct.

The Court: Dr. Harvey and Dr. Patterson, those will be the three.

The Clerk: Donald Patterson?

Mr. Henson: That is correct.

The Court: Now, what is indicated next?

The Clerk: What is indicated now?

Mr. Henson: What is indicated next I imagine, your Honor, is a setting for trial, and as we discussed last week, [fol. 29] the date of February 16th was set for the trial of co-defendant Duncan, and at that time you apparently had in mind setting a joint trial for all three defendants at that time and asked me whether I had any objection to that trial date and I stated that I did in view of the sentiment that was expressed in the courtroom at that time, which to me suggested prejudice. I thought that it would be better for all concerned if the Court set the trial for a later date and I suggested the middle of March and the Court did, however, set it, I mean left the trial date for co-defendant Duncan as February 16th.

Mr. Danch: May we proceed with the plea on defendant Baldonado, your Honor, so I may also join in the argument on the trial date as it stands now?

The Court: Baldonado hasn't entered his plea.

Mr. Danch: No, not yet.

The Court: Are you ready to proceed now?

Mr. Danch: Yes.

The Court: All right, Mr. Baldonado, Augustine Baldonado; that is correct, is it not?

Defendant Baldonado: That is correct, your Honor.

The Court: All right, to the indictment, how do you plead, guilty or not guilty?

Defendant Baldonado: Not guilty and not guilty by reason of insanity.

The Court: Let the plea be entered, Mr. Clerk, a plea of not guilty and not guilty by reason of insanity.

[fol. 30] Mr. Danch: We will stipulate, your Honor, that the same doctors may be appointed as were appointed for the defendant Moya.

The Court: All right, Dr. Nash, Dr. Harvey and Dr. Patterson are appointed.

Mr. Gustafson: Now, your Honor, I ask that the trial date be set for February 16th at 10:00 A.M., the same as with respect to the co-defendant Elizabeth Duncan.

The Court: Well, we haven't set the trial date for these defendants.

Mr. Gustafson: Not yet.

The Court: We have not yet set it.

Mr. Gustafson: Not for these two, but we have for Elizabeth Duncan and the defendants are jointly charged.

The Court: I think the trial date is all right. What is that?

Mr. Gustafson: February 16th.

The Court: February 16th, at 10:00 o'clock.

Mr. Danch: Your Honor, I request that a later date be set on the ground that I have a very crowded trial calendar now and it will be very difficult for me to prepare adequately by February 16th. I have about five trials set. I have a trial set on January 23rd, 26th, February 3rd, 4th, 10th, 11th, 13th, 17th and 19th, and I think there would be no prejudice to the People if it were set off to some time in March. It would be very difficult in view of the [fol. 31] fact that much of the investigation is going to have to take place in another county to get done in this time. Being appointed by the Court I am, of course, required also to earn a living in the meantime and I can't dispose of all my cases. I have to continue my work and I think that any attorney that would be appointed would be in the same predicament so far as other trials are concerned. I think it unduly prejudices the defendants to go on trial that quickly and I object to that date on that ground.

The Court: Well, you have over a month. Today is just the 13th day of January. You have got more than a month. I have never known you to be quite that busy before.

Mr. Danch: Well, it just happens I am at this time, your Honor. Those dates are set, including a trial in this court on——

The Court: he trial is set for both these defendants for February the 16th at 10:00 o'clock. Remanded.

Mr. Danch: Your Honor, I have one other motion to make. At this time I request that the Court make an order allowing me to hire an investigator to work with me on this case. I think the allowance of at least $500 should be made for that purpose.

The Court: Well, I don't suppose you have anything to say about that, Mr. District Attorney.

Mr. Danch: I don't think he should, your Honor. I don't think an opponent or adversary should be called [fol. 32] upon to rule upon my defense.

Mr. Gustafson: I only raise the question——

The Court: What?

Mr. Gustafson: I say I only raise the question of whether any court order is necessary with respect to the employment of an investigator or for the incurrence of any expenses in connection with the defense, whether they be long distance telephone calls or what they be, as I understand it.

The Court: Well, I have that in mind. They are appointed by the Court and they certainly are entitled to certain expenses. We will cross that bridge when we get to it.

Mr. Henson: Your Honor, on behalf——

The Court: I have said enough, anyway, to show that I would be inclined to be lenient.

NOTICE OF MOTION FOR REMOVAL OF ACTION AND ARGUMENT THEREON

Mr. Henson: On behalf of defendant Moya I hereby make application for removal of the action under the provisions of Section 1033 of the Penal Code. This motion is made in writing. The notice of this was served upon the Assistant District Attorney yesterday at 9:05 and is supported by affidavits of the defendant and other persons. I have filed it here with the Court and also as part of the affidavit which should have been attached to the affidavit, but which was practically impossible, are certain copies of newspapers here which I have referred to as exhibits, and they should be regarded as attached to the affidavit and a [fol. 33] part thereof, and I ask that these also be filed with the Clerk to accompany the affidavits.

Mr. Gustafson: I have prepared counter-affidavits, copies of which I have served on all counsel, counsel for Elizabeth Duncan, for Mr. Baldonado and for Mr. Moya, and I now file the counter-affidavits.

Mr. Danch: On behalf of defendant Baldonado I have filed, your Honor, an application for removal of the action based on the affidavit of the defendant and also referred to the affidavit filed by Mr. Henson.

Mr. Gustafson: And Mr. Sullivan.

Mr. Danch: And Mr. Sullivan, yes.

Mr. Henson: I am prepared to argue this motion at this time, your Honor, if you care to hear argument.

First of all, I think we have to start with the proposition that this is not just a case where, like the defendants in your regular criminal calendar which was just disposed of, they may spend a year in the County Jail or maybe a year or so in prison. This is a case where the prospects that the defendants look forward to may be the dropping of the pellets and the directions to count to 10 and take a deep breath, so that this case I think ought to be considered in that light.

I think that the case ought to be considered in the light of the case of the People versus McKay, 37 Cal. 2nd, 792, where the basic legal proposition was spelled out and the [fol. 34] court states this: regardless of their guilt, however, they were entitled to a fair and impartial trial, and that case cites the case of Moore versus Dempsey, 261 U.S. 86, and a concurring opinion of Justice Jackson in Shepherd versus Florida, 341 U.S. 50. So that we have to start with that proposition, that regardless of the guilt, it is not a question of guilt or innocence at this point, it is a question of whether this defendant or any of these defendants can be afforded a fair and impartial trial, and it doesn't only apply to these defendants, but it is something that goes a lot deeper than just the merits of this case.

First of all, I think a fair and impartial trial means something approaching objectivity. Now, if you will look at the affidavits which have been filed by myself in this case, you will see that there were several very substantial citizens of this community and of this County, first of all, Rev. Gilbert of the St. Paul's Episcopal Church in Ventura, and a Rev. Floyd K. Gressett of the Avenue Community Church in the City of Ventura. These are ministers of the gospel who have had some connection with criminal law, Rev. Gilbert having at one time served as a chaplain to the Washington State Prison, and Rev. Gressett at this time serving as chaplain to defendant Moya. This fact is known by their friends and acquaintances and so, naturally, this case is going to be discussed with them. Their affidavits state clearly that those persons with whom they have discussed the case have either expressed a [fol. 35] deep-seated prejudice against these defendants,

professed a knowledge of all of the facts of the case, either that or they expressed the opinion that it would be impossible to have a fair and impartial trial in this County because of the prejudice.

Along with the two persons whom I have just referred to we have affidavits by three attorneys in this County, in this community. Donald L. Benton, an attorney of some years of practice, states that people, when he has discussed this case with them, pointed out that their opinions and prejudice were based on newspaper releases issued by law enforcement agencies, said that they stated in return "They better not let me on the jury. I would hang them."

We have affidavits by attorneys David Drapeau and Albert T. Blanford of this community who stated in substance that practically everyone they have talked to has expressed an opinion, either an opinion that they were prejudiced or that the defendants could not obtain a fair and impartial trial.

Besides that we have an affidavit from a David E. Flynn who was formerly Judge of the Justice Court of the Moorpark-Camarillo Judicial District who spoke to a man who said in substance that "Everyone connected with this case should be summarily exterminated," and even went so far as to say that he had intended to consult with one of the defense counsel as a private attorney, but since that defense counsel was connected with this case, he wasn't going to [fol. 36] see him as an attorney, and stated that from what Mr. Flynn stated was the lynch law, then the lynch law should be applied in this case, stated that it would hurt particular defense counsel in law practice if he continued to serve as defense counsel. This man stated to David Flynn that he had talked to 12 other persons in the Oxnard-Camarillo area and they felt the same way.

This, I hope your Honor realizes, is just typical. We couldn't in the time allotted, like Mr. Danch has just stated here, spend 24 hour a day running around getting people to sign affidavits. Now, we are not like the District Attorney with a staff of eight or nine lawyers and four investigators to work for him. We have to do all this ourselves, besides trying to carry on a private law practice and, as Mr. Danch has stated, and I will state that we are not

wealthy attorneys who can afford to lose time from our private practice.

Now, I didn't think too much about prejudice in this case myself until I appeared in this court last week and heard the group prejudice that I heard in this courtroom, and I didn't think it was so bad until I went home and told my family that I had been appointed on this case and my 11-year-old daughter told me that it was a bum case and "What did you do that for?" And when it goes that far, I say that something is wrong.

Now, I hope your Honor will read and consider those newspapers which we have attached to the affidavits. Pri- [fol. 37] marily, they are newspapers from the Oxnard Press-Courier and the Ventura Star-Free Press, which are the only two daily newspapers that I know of in the County of Ventura. The Oxnard Press-Courier professes to be the official newspaper of the City of Oxnard and, of course, the Ventura Star-Free Press is more or less considered the official newspaper in the City of Ventura and the County of Ventura.

Before I was on this case, we talked to many people about it and everybody I talked to, except one man, referred to these defendants in terms such as "Dirty bastard, lousy son of a bitches", and things like that, had their minds made up, either that or they expressed the sentiment that public officials had made such statements about this case that there couldn't possibly be a fair trial. As I say, only one man said that he would try to reserve judgment, but he added that, "I hope I am not called upon to serve as a juror."

Now, the worst part of the prejudice that exists against these defendants I believe is the fact that the District Attorney and the law enforcement officers connected with the investigation of this case have been the primary cause of the prejudice. As a typical example—I am not going to take the Court's time up with a recital of everything. I hope your Honor will read each and every one of these newspapers and see if you try to put yourself in the place of an ordinary lay citizen man on the street with no knowledge of the law or the legal processes, read all these newspapers and [fol. 38] then ask yourself whether you could serve as a fair and impartial juror on this case.

I am just going to cite two or three examples here, and

the most flagrant example that I can see appeared on the front page of the December 22nd edition of the Ventura Star-Free Press when the headline says "DA Urges Death Term in Killings." This was dated December 22nd. This case never even went to the Grand Jury before December 26th. It states here: "District Attorney Roy Gustafson today saw the Duncan murder as reason for continuation of California's death penalty. He issued the following statement:" And I say this is a statement of a personal opinion which has some ethical connections with it as well as certainly creating prejudice against these defendants in this case, as well as being this: if this same statement were made before your Honor in the trial of this matter, I believe your Honor might consider it very seriously as being inflammatory and perhaps prejudicial misconduct on the part of the District Attorney but, mind you, this was made before any legal body had taken any legal action on this case. That is as follows:

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders in the face of these events can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a [fol. 39] crime. Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course, penalties do not completely deter crimes. Jail sentences do not completely deter drunken drivers, burglars, robbers, or any other criminals and death penalties do not completely deter murders, but there is no reason to dispense with penalties. Retaliation is a basic instinct of the human race. In civilized societies the government takes over from the individual the job of retaliating against a wrongder. From Biblical times a life for a life has been recognized as just and fair. The alternative in California, a life sentence which permits a prisoner to be paroled in seven years simply is insufficient retaliation. I hope the people of this State rise up against the propaganda drive that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."

So before the case has ever been presented to the Grand Jury, before any complaints have been filed or anything else, the District Attorney is whooping it up and trying to make it a political issue and trying to use it, whatever it is, his idea of what the outcome of the case should be as an example of why the Legislature should retain the death penalty.

This same statement appeared in the Oxnard Press-Courier, and further along the way when there was one situation here in the December 27th edition—excuse me—par-[fol. 40] ticularly in the December 30th issue, edition of the Star Free-Press on Page 6 there is a big headline "Testimony in Duncan murder revealed", and in passing there is a question in my mind of how and why the whole transcript of the Grand Jury testimony was released to the newspapers and there is a question in my mind of how come the newspapers proceeded thereafter to have daily installments of this nine hours of Grand Jury testimony appear almost as other installments of a murder story or something like that.

But the worst of all on Page 7 here is the sub-headline "Roy Gustafson explains why penalty for the Duncan murder trio." This is, of course, after the Grand Jury has acted, but before the court has acted, and he gives a lengthy dissertation of his views about the death penalty, about rehabilitation, and says that rehabilitation, as far as defendant Moya was concerned, Moya was paroled a year ago after serving a year out of a one to 10-year term for marijuana possession. Gustafson says, "Moya was using marijuana when he was arrested in the Duncan murder case." And he, Gustafson, comments that the possibility of putting California's third woman in the gas chamber does not present him with any qualms. "This is appropriate punishment," he says, paraphrasing the Judge in the Harvey Glatman case, he adds, "what are you going to do to them, rehabilitate them?"

Now there are many others here. Like I say, I hope your Honor will read them and put yourself in the place of a prospective juror.

[fol. 41] Now it isn't enough that the District Attorney argues his case before it is ever presented to the Court, but it seems that all the evidence in the case has been presented

to the public by way of the newspapers. Now, this was done through various officers who were involved in the investigation of this case. If you will read through these newspapers, you will find here, there, every day, just about, various officers were quoted, or the things was that Officer So and So said this, Officer So-and-So said that. As a typical example of this is in the Monday, December 22nd edition of the Oxnard Press-Courier on Page 1, and the headlines, "Confessed Slayer Leads Deputies to Missing Nurse's Shallow Grave. Says Mother-in-Law Bought the Murder."

Going down in the column, I quote, "This is the story related to the Press-Courier by Deputy Higgins. He and Clarence Henderson, Chief Investigator for the District Attorney's Office, questioned Baldonado late yesterday morning. At noon he confessed the murder. Baldonado says he and his accomplice Moya drove to the Santa Barbara home of the pretty 30-year-old nurse late in the evening." I am not going to read it, but it is all here. Here is before the Grand Jury or anybody else has ever acted upon the case, a Deputy Sheriff relating the whole substance of a confession, and I say that is just a typical example.

Another example is in—in other words, after the headlines, after the officers got through talking and telling all [fol. 42] about the evidence and after the District Attorney got through arguing his case, then the newspapers, apparently to keep public opinion alive, started printing verbatim passages from the Grand Jury transcript. An example of this is in the December 31 edition of the Oxnard Press-Courier where after an article stating that killer's wife had twin sons after the murder, down at the bottom it says in parentheses "Press-Courier today continues printing testimony that led to a Grand Jury indictment of Elizabeth Duncan, Baldonado and Moya. Most of Moya's testimony is on Page 9 today."

I know your Honor has tried cases and been a Judge and been connected with the law for many, many years. I don't mind trying a case, no matter what the evidence is, even though my own daughter thinks it is a bum case, as long as the case hasn't been tried already, and I say that this case has been tried already. It has been tried by the officers

telling every phase about the investigation. It has been tried by the District Attorney with his statements of personal opinion, wih his dissertations on the death penalty and the theory behind it. It has been tried by printing practically every important part of the Grand Jury transcript verbatim. And I believe that and juror who is called upon to hear this case is going to feel just like he is sitting through a movie a second time. I say that is not a trial. That is not what the court processes are for. If we are going to have a trial with people like that sitting on the jury, there is no sense in having a trial. We might as [fol. 43] well just go ahead and sentence these people now because there is no point in going through the process and taking up the Court's time and spending the County money, going through the motions.

So I ask your Honor to give some real serious thought to this case, putting yourself in a number of positions, first of all, as a prospective juror after you read these newspaper articles. Like I say, newspapers weren't the only thing. There was television, radio, practically every means of communication. Put yourself then in a juror's position. Then put yourself in the District Attorney's position. Would you want to try a case, would it be any smashing victory to you to try a case before a stacked jury?

Put yourself in the defense counsel's standpoint. Would you feel like you were doing anything? Would you feel like you were getting any kind of a fair shake if you were going to try a case before a jury composed of people that knew all about the case, that heard the case argued, and so forth, and then ask yourself in your own position here where you as a judge, if it ever came to point where if you had to sign the papers that sent these people where they might go, are you going to feel right about it?. That's all.

ARGUMENT BY MR. DANCH

Mr. Danch: Your Honor, I think that Mr. Henson certainly has covered the extent and nature of the publicity that was given to this matter.

I have examined Mr. Gustafson's counter-affidavits and [fol. 44] it appears to me that he dwells heavily on the fact that his conduct was legal, that it was legal for him to give out information and that it was legal for him to

give his opinion. Well, certainly it was legal, but I don't think that is the question here. This is not the proper place to decide the legality or propriety of his conduct. The only question is whether or not the conduct did occur and what effect it had on the people.

The District Attorney, as a public servant, is listened to by the people. His words carry more weight than the ordinary layman, even more weight than defense attorneys, and that is why the law holds him to a higher standard of conduct than of other lawyers. When he is in trial, he is obliged to hold or regard the rights of the defendant, not only to prosecute him.

I think in this instance this case has aroused more publicity than any case certainly since I have been in Ventura County. I think the statements of the District Attorney have been more inflammatory than any I have ever seen since I have been in this County or anywhere in the State.

I think as a result of the intense publicity, combined with this statement, whether or not he has a right to make them, that there now exists a situation that makes it impossible to have a fair trial in this County.

Mr. Gustafson says he has as much right as Rev. Gilbert to express his opinion. That is true, but his opinion carries [fol. 45] more weight with the public.

The Grand Jury transcript does, in fact, carry all the testimony and the newspaper men do have access to that. So if he says whether or not he released the evidence, it would appear in the transcript, that again to me is immaterial. The fact is that because of the nature of the case, publicity has been focused upon it and that evidence is given much greater publicity than it would have ordinarily. Generally speaking, people aren't bothered with a Grand Jury transcript and do not read them. In this case I think most of the people are familiar with most of the transcript. In the event that the case goes to trial and some of the evidence that was presented at the Grand Jury hearing was excluded, it would be of no practical value to the defendants because, in fact, all of the jurors would know that that evidence had been admitted in the Grand Jury hearing, so that jurors do not, as a rule, have the ability to wipe their minds clean of evidence which was not admitted.

I think that it would be almost, in fact, impossible to have an impartial jury, a jury that would not have most of the evidence in mind whether is was legally admissible or not.

ANSWER BY MR. GUSTAFSON TO ARGUMENT

Mr. Gustafson: Your Honor, I would like to take up these items in a chronological order, if I can, in answer to Mr. Danch's argument and in answer to Mr. Henson's argument.

The basic section is Section 1033 of the Penal Code. [fol. 46] The only ground for removal is that a fair and impartial trial cannot be had in the County. The cases are clear that that refers to the inability to get a fair and impartial jury of 12 persons in the County. All of the matters which have been submitted by affidavit and allegations by Mr. Danch and Mr. Henson must necessarily be considered in the light of do those affidavits prove that we cannot get 12 persons in this County who will act fairly and impartially?

Mr. Henson and Mr. Danch first say that we can't because the facts of the crime have been released to the newspapers, to the radio, to television, and hereafter I will use the term "newspapers" to cover all media of communication, and have been printed therein.

Well, this is not unusual. It may be unusual in this case because of the unique nature of the facts of this case. It may be unusual in the sense that more was printed but every day in the newspapers throughout this whole United States facts are printed about the fact that a crime occurred in as many details as newspaper reporters are able to get showing the exact fact that did occur. It seems to me that it will be a sorry day for this country when any rule or law is enacted which prohibits the newspapers from reporting events that have happened.

Nor does any rule of law prohibit any public official whether it be I or an investigator or a Deputy Sheriff of a chief of police in Santa Barbara or an FBI agent or the [fol. 47] District Attorney of Santa Barbara or any other person, from giving information and facts to the newspaper. As a matter of fact, I think it is a matter of common knowledge that this very often helps to solve crimes.

The very solving of a kidnapping of a baby in New York the other day or yesterday was solved principally because of the wide-spread publicity given to the description of the woman who took the baby and a broadcast for getting an annonymous call to the police station that the police would check out, and they checked out one annonymous call and found the baby and found the person who had the baby. I don't see that there is anything wrong, and Mr. Danch admits there is nothing legally wrong, with newspapers publishing information nor with officials giving information to the newspaper.

Now, with respect to the cases on what has happened when facts are printed in the newspapers, the only cases, your Honor, in which it has ever in the whole United States been held that the newspaper publications of the account of a crime have prejudiced the defendant and kept the defendant from having a fair trial is when the facts, the purported facts stated in the newspaper are not facts; namely distortions and untruths and lies and of made-up stories. This is the harm, not that facts are published, but that misfacts are published. And in this particular case there isn't one affidavit presented by Mr. Henson or Mr. Sullivan, whose affidavit was incorporated by Mr. Danch's, or Mr. Danch which says that one fact stated in any of the [fol. 48] newspaper reports is untrue. Now, the only denial of the truth of anything reported in the newspaper comes not from the defendant, but from me. In my affidavits before your Honor I point out that there are some, there was at least one misstatement and that was with respect to a statement quoted by Mr. Henson in his affidavit, and again to the Court orally, that I said that Moya was using marijuana at the time of his arrest. My affidavit denies that I ever stated that to the newspaper or to anyone. My affidavit shows that the newspaper the next day published a statement stating that this was in error and that I had not stated any such thing, but Mr. Henson conveniently neglects to mention that that was corrected by the newspaper itself. He only talks about the first statement, the misstatement that was made.

Now, it is true, your Honor, that there are some facts and they are true and correct facts which are published by newspapers at times which would be inadmissible in court in evidence. In this particular case I think reference has been

made to the fact that Mr. Moya is an ex-convict. In the exhibits attached to Mr. Henson's affidavit it shows that statements have been made that Mr. Baldonado had been convicted, for example, of failing to provide for his children and Mrs. Duncan was convicted of a morals offense in San Francisco, and these things will not be admissible in evidence in the case-in-chief by the prosecutor, but, again, the fact that any court of law by reason of some rule the jury [fol. 49] is not permitted to hear the truth does not require that a newspaper or other media of communication keep their readers from hearing the truth.

Now, with respect to the transcript, I point out in my affidavit, and I assert here again, your Honor, that there was nothing that was published prior to the return of the indictment by the Grand Jury and the official filing of the Grand Jury transcript, which then became a public record, nothing relating to the facts which was published prior to that time which equaled in detail the facts as related in the Grand Jury transcript. So that regardless of whether the people of this community and other communities in California had known anything about this case or even heard of it prior to the filing of the Grand Jury transcript, they would have heard all about it at that time and in more detail than they ever heard prior to that time and with more accuracy because all of the testimony was under oath and not the result of newspaper interviews.

Moreover, the fact is that when any indictment is filed in court with the names of the witnesses appended to it, as is required by law, there is nothing to preclude a witness from telling a newspaper reporter what he testified to before the Grand Jury. And the papers that Mr. Hanson has attached as exhibits will show to your Honor that already the enterprising newspaper reporters had begun to interview persons who were witnesses before the Grand Jury and were then publishing what those persons said [fol. 50] they said to the Grand Jury. It seems to me that it is much better that the information come directly from quotes of what the Court Reporter says they said at the Grand Jury than what they recall having said at the Grand Jury, because truth is what I believe the newspapers are interested in and what the public wants to read and I can see no harm in the truth.

I emphasize again that there is not one single word in

any affidavit by Mr. Henson or Mr. Danch saying that the journalists have misstated the truth. There is from me, but not from them.

Now, that is with respect to the facts constituting this particular case. There was another statement alluded to, very much alluded to by Mr. Henson in his affidavit, by Mr. Sullivan, by Mr. Danch by incorporating it in his affidavit, and that was my statement with respect to my views on the principle of capital punishment. The statement quoted in the affidavits of defendants is inaccurate, and I have set forth in my affidavit the exact statement that was made and the exact statement that was published as having come from me in the Ventura County Star-Free Press. Mr. Sullivan's affidavit omits several very important words in that respect. I think I have a perfect right and now I am glad to hear Mr. Danch acknowledge that I have just as much right to express my view with respect to legislation as Rev. Gilbert or any other person. It just so happens that our views differ on this as to whether [fol. 51] capital punishment should be abolished in California.

I certainly respectfully disagree with Mr. Henson when he states that this is a statement of my opinion regarding the defendants in this case. I urge the Court to read that statement and to try to find any reference to the defendants collectively or individually in this particular case. I refer to the perpetrators of such a crime as the murder of Olga Duncan and, of course, that necessarily means that it must first be established that Olga Duncan was murdered, secondly, who the perpetrators were. Now, there was no reference to these defendants by name or otherwise as individual persons and no reference in there or any other time of mine to my personal belief and knowledge of the guilt of the defendants. Never has there been any such statement made.

Now, Mr. Sullivan incorporates in his affidavit another statement purportedly made by me with respect particularly to the defendants and their guilt and what should happen to them. Mr. Henson on information and belief and, obviously, because he read Mr. Sullivan's affidavit, repeats this statement, and he says it was published in the Ventura Star-Free Press of a particular issue. I have filed an affidavit in which I deny ever making any state-

ment of that nature or anything substantially like it. I have an affidavit from the managing editor of the Star-Free Press stating that no such statement was ever published in that newspaper, despite what Mr. Sullivan's affidavit says, [fol. 52] and I represent to the Court that I have no knowledge of any such statement having ever been published in any newspaper in the United States. I haven't the slightest idea where it came from and I say in my affidavit categorically it is absolutely false and untrue in all respects. I never said any such thing.

Now, insofar as the statement that I made and the only statement that I issued in writing with respect to my views on the retention of capital punishment in general in California to deal not with the Duncan case, but to deal with situations such as the Duncan case, cannot possibly, as a matter of fact, be prejudicial to the defendants. In the first place, of course, it referred to the perpetrators of the crime. The trial in this court set for February 16th will now determine whether all or any of these defendants were the perpetrators of that crime. If they are not guilty, they weren't the perpetrators of that crime and it couldn't possibly apply to them. If they are guilty, they were the perpetrators of the crime and then it would apply them, but even so, it would not be prejudicial because all it would be doing would be disclosing that if somebody is guilty of a first degree murder of Olga Duncan, I believe that somebody deserves the death penalty. Disclosing that in advance can't do any harm to defendants.

When this courtroom is full of jurors next February 16th and these prospective jurors get in the box, the very [fol. 53] first thing that they are going to know is that the prosecutor seeks the death penalty because the very first questions that will be asked of them before any jury is sworn in is whether they have any conscientious objections against the death penalty. Your Honor well knows in every murder trial where the prosecutor seeks the death penalty everyone knows it before the jury is actually sworn, and I can't imagine what difference it makes whether they know it three days before the jury is sworn or four days, as the case will likely be when this trial starts, or whether they know it six weeks or eight weeks before the jury is sworn.

I also want to mention this, your Honor, with respect to the statement on capital punishment: I have an affidavit from Mr. McHenry, the managing editor of the Star-Free Press, that should actually make the defendants very happy in this respect. The only response that the Star-Free Press received to my statement with respect to capital punishment were letters against my stand, three of which were published. They received not one single letter from anybody in Ventura County concurring with the fact, concurring with the belief that capital punishment should be retained in California. Moreover, another thing not mentioned by Mr. Henson orally or in his affidavit, was that he made a great statement, much longer than mine, which was published in full in the Ventura County Star-Free Press, attacking me, stating his views about rehabilitation, about society being the cause of a lot of ills, and so forth. [fol. 54] All of that as against the one statement that I made with respect to a legislative matter.

Now, the most essential thing, apparently, that all of these affidavits of the defendants goes to do is to state that people have made up their minds in Ventura County as to the guilt of these defendants. Well, in the first place, your Honor, there is not one single affidavit before you from one single resident of Ventura County stating that he, that resident, has made up his mind about the guilt of the defendants. All of the affidavits are from persons who stated that other persons have told them, told the declarant in the affidavit that other persons have made up their minds. I think that that, in the first place, is legally insufficient. There isn't a single affidavit from a single person stating that he has made up his mind.

Secondly, and most important, and I urge your Honor to read the case with respect to this, as I am sure you will, and to read the law of the State of California and the Penal Code section, the fact that newspapers publish reports about the facts of a crime and the fact that people, prospective jurors read the reports and the fact that they will, on the basis of those reports, form an opinion of the guilt of the defendants and have and retain that opinion and have expressed that opinion when they come to sit as jurors is an acknowledged fact in California and one recognized by our law. And so our law provides in Section

1076 of the Penal Code that no person shall be disqualified [fol. 55] as a juror by reason of having or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor or statement in public journals, circulars or other literature or common notoriety. The fact that people in Ventura County have formed opinions of the guilt of these defendants and if they come to this jury box and have those opinions and have previously expressed them is no disqualification for them to sit on the jury, provided, providing it appears to the Court upon his declaration; that is, the declaration of the prospective juror, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him.

Now again, your Honor, there is not a single affidavit before your Honor from these defendants stating that any of these persons, unnamed, not a name given, who supposedly said their minds were made up the defendants are guilty, there is not one word of evidence saying that these persons would not, despite those opinions, act fairly and impartially upon the evidence if they were called upon to serve as jurors, despite the fact that they have an opinion of the guilt of the defendant. It is rather difficult, not rather difficult, it is impossible for me to get any affidavits from any of those persons who have such opinions of the guilt of the defendants stating from those persons that they would, nevertheless, act fairly and impartially, because for whatever reason, all of these affidavits submitted [fol. 56] by Mr. Henson do not name one single person by name so that I can find out who these allegedly opinionated persons are.

Again I repeat that the crux of the matter is whether we can get a fair and impartial jury and despite opinions we can get a fair and impartial jury under the law if these persons will say that they abide by the evidence in court and not be governed by the opinion that they have heretofore reached or expressed from facts they read in the newspapers.

Mr. Henson did not argue, but he mentions in his affidavit the fact that there must be a lot of prejudice because the Grand Jury returned an indictment in 15 minutes. There is no merit to that argument because 15 minutes is

not an unusual time for the Grand Jury to deliberate and return an indictment. I personally cannot recollect, and I said so in the affidavit, in any cases before the Grand Jury in my eight years as District Attorney where the Grand Jury took any longer than 15 minutes to deliberate before returning an indictment.

Moreover, in the case of People versus Daugherty, which I cite in my affidavit, here was a long trial with a transcript five times longer than the transcript in this Grand Jury testimony, a trial before a trial jury involving, first of all, the issue of guilt of the defendants and, if so, what degree of homicide they were guilty of, and then if guilty of first degree, what the penalty should be, and that jury deliberated one hour and 15 minutes after a lengthy trial and re-
[fol. 57] turned a verdict of first degree murder with the death penalty and the Supreme Court brushed aside the argument that that showed that the jury was prejudiced and didn't give consideration to the facts. I quote extensively from that case to show that there is absolutely no merit in this statement, particularly since, as the Supreme Court said in People versus Daugherty, the evidence was pretty clear, although it was all circumstantial in that case, there wasn't much question about the killing that occurred in this place.

I wonder what people would think of the members of the Grand Jury of Ventura County if they had a great deal of difficulty after listening to Mr. Moya and Mr. Baldonado testify completely with respect to what they had done to Olga Duncan, if the Grand Jury had to debate an hour or two to decide whether Olga Duncan was killed and, if so, by whom.

Mr. Henson also mentions in his affidavit, and he did not say this in court, but he mentions it in his affidavit that he believes that the people of Ventura County are prejudiced against persons of Mexican origin. This is the first time that any issue of that has been raised by anybody, and it is injected in here by way of an affidavit by Mr. Henson. In my counter-affidavits I think I have set forth that in my experience as District Attorney there has been no such prejudice exhibited by any Judge in Ventura County or any jurors in Ventura County, nor have I heard it from people with respect to criminal cases. If anything, there

[fol. 58] is certainly an attitude on the part of the people of Ventura County to be very broadminded, fair and impartial with respect to persons of Mexican origin who might be defendants in criminal cases. Certainly your Honor knows it is true and I know it is true, and I have set it forth in the affidavit, that in the entire time in Ventura County I know of no single case where any court, trial or appellate or otherwise, has ever said that any person of Mexican origin did not get a fair trial from a jury or a judge because he was of Mexican origin. I think that reason is as fallacious as the others set forth.

Then Mr. Henson makes a big point of the fact that this courtroom was crowded at the arraignment a week ago today. And as a matter of fact, the fact that he doesn't think much, he doesn't really believe that these newspaper accounts have prejudiced his client or made it impossible to get a fair and impartial jury in Ventura County is illustrated by the fact that he said that until he walked in the courtroom here last Tuesday he wasn't thinking about prejudice or change of trial or anything, but it was the courtroom crowd that gave him this idea. Now, all these newspaper accounts were published before last Tuesday. They didn't phase Mr. Henson then. Now it is an afterthought, but he says when he walked in here he saw this crowd and this is what convinced him that they couldn't get a fair trial.

Well, I will say this, that I have an affidavit from the [fol. 59] Undersheriff denying that there was any such number as 1,000 persons in or out of this courtroom or in and out together. I think it is quite fair to state that your Honor can observe and know how many people are in the courtroom. There are 99 seats in this courtroom. Sure, there were people standing, but there weren't as many people standing as there were sitting and outside the door there was a small group of people. The Undersheriff has filed an affidavit here that in his opinion there were less than 200 people both in and out of the courtroom. And I would be happy if Mr. Henson wants to put on the reporter from the Los Angeles Examiner and put him under oath, who was the representative of the Examiner, which was the paper that published that there were a thousand persons in this courtroom, and ask him how many there really were in the courtroom and outside of the court-

room. I can't help it if the Los Angeles newspaper says there were 3) thousand people here when, in fact, there weren't. The defendants know there weren't, counsel know there weren't and you, your Honor, knows that there weren't.

Furthermore, the fact that there would be a lot of people here would not be unusal considering that there are 170,000 people, at least, in this County and that the facts of this case are rather unique and that people are naturally curious. They wanted to look, apparently, at the defendants.

Today, one week later, look at the people in the audience. The 99 seats aren't half taken by persons, one week [fol. 60] from the day. Now, certainly that indicates the true nature of what occurred one week ago when there were a couple of hundred people in the courtroom.

Then there was a report quoted in Mr. Henson's affidavit, but not argued by Mr. Henson, that prejudice was shown because the newspaper reported that someone had swung at Mrs. Duncan with a purse, tried to strike her. The affidavit from the Sheriff, which is on file here, says that he investigated this alleged incident and talked to all kinds of people, newspaper men, officials, spectators, and so forth, and nobody can be found by him who reported seeing any such thing and the only information that reached his ears that any such thing happened was a report by Mr. Sullivan's investigator, Mr. Lewis, that this had occurred.

Now, Mr. Henson in his affidavit says that I represented to the Court that the trial should be had within 30 days and insisted that I had a right to a quick trial. I am not going to go into all of that because I have set forth the law precisely in my affidavit. The Penal Code section which does state that the trial shall be had within 30 days and also the Penal Code section which states that the People of the State of California have a right to a trial as soon as possible, Section 1050 of the Penal Code states that the Court shall set all criminal cases for trial for a date not later than 30 days after the date of entry of the plea of the defendant. Actually, the trial that was set today, your Honor, for these two defendants is for a date later than [fol. 61] 30 days from the date of entry of their plea that was made here today.

Section 681a of the Penal Code states: "The welfare of the People of the State of California" my client "requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all District Attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice."

I would have been derelict in my duty had I not urged to the Court that the trial be set within 30 days and certainly at the earliest possible time in accordance with the Code Section.

Finally, your Honor, I have read many cases on this application for change of place of trial. There is an excellent article in Vol. 44, California Law Review at Page 108. It summarizes the law in a fashion much better than I could if I attempted to do it from the cases. There is a note by Paul Peterson, a capable attorney, and I have checked the cases since this was published in 1956 and there are no additional cases on this point, so everything is in this note and article. And it is clear, first of all, that after over 60 cases in the appellate courts where defendants have complained about the trial judge refusing to order a change in the place of trial, only four in the entire [fol. 62] history of California have held that the trial judge was wrong and should have. There has been only one such case in the last 50 years and only two such cases in the last 80 years, and the facts of those cases, and I won't go into them here, are completely different from the facts in this case.

The facts in the case quoted by Mr. Henson, the only one cited to the Court by Mr. Henson in his argument, People versus McKay, were that the judge of the Superior Court wrote a letter which was published in the newspaper at the very time the trial was starting saying that the defendants were guilty and that the defendant's attorneys had said they were guilty and it would waste the County's money to try the case. Now, that is quite different from this case. It had many different aspects than this case.

There are countless cases, on the other hand, where the facts were similar to the case at bar where the trial court denied the application to change the place of trial and it was upheld.

Furthermore, there has been no case, to my knowledge, in any appellate court reporting on the aspect of either the granting or the denying of this kind of an application made at this time. The time when the applications have been made and considered have been at the time when the jury was being selected. Certainly it is premature at this time for Mr. Henson to assert that we cannot get 12 impartial jurors until we get a group of prospective jurors in [fol. 63] here to see if we can't get 12 impartial jurors.

Moreover, any excitement that may have existed at the time the facts of this event were revealed and the time that I made any statements and the newspaper published any accounts certainly will have subsided by five weeks from now when the trial starts, if there was any to begin with. And I point to the evidence of today's courtroom to indicate that just one week after the first arraignment of the defendants this is how much interest there is in the matter, and I assert that five weeks from now when the trial starts, it will be just five weeks that much older and colder news and interest.

We have not had any difficulties in Ventura County before in getting juries to try cases despite the fact that other cases of murder in which the death penalty was imposed had the facts published beforehand, although I admit that not nearly in the degree that they were published in this case, because this case is more unique and there is more interest in it.

The only difficulty that I have ever had in capital cases in getting a jury was not that the jurors were prejudiced against the defendants or had formed or expressed any opinions that they refused to set aside and refused to agree to listen to the evidence and base their decision on that, the only difficulty we have ever had, and I suspect we will have it in this case, is that I can't get jurors who do not have conscientious opinions against the death penalty or [fol. 64] jurors who will not accept circumstantial evidence. The difficulty has been not in the defense side, but in the prosecution's side.

Consequently, to sum up, your Honor, I believe that it is quite apparent, after your Honor considers the affidavits of the defendants, that there is nothing in any of them that goes to the precise question involved: Can we get 12 persons who will, despite their opinions, listen to the evidence

and hear the case with impartiality? There isn't a single statement in that affidavit by a declarant saying he wouldn't do such a thing. There isn't a single statement in an affidavit by a declarant that says that anybody else wouldn't do such a thing. All they are are broad, generalized statements by declarants saying, Rev. Gilbert, Rev. Gressett, the attorneys, three attorneys, saying they have talked to a lot of people. A lot of people say that the defendants are all guilty, ought to be executed, and that there is a great deal of prejudice, a legal conclusion, of course, against the defendants, not one single word that goes to the precise point.

And I most respectfully suggest that if this Court has any question whatever about the ability in Ventura County to get decent citizens who will hear this case impartially, at least the decision on that question ought to be deferred and is permitted according to law, as stated in the California Law Review, "The trial court is entitled to deny a motion for change of venue with leave to renew the motion after voir dire."

[fol. 65] I respectfully suggest that if there is any slight doubt in the Court's mind or inclination to believe that there wouldn't be 12 persons in this County that could hear this case, at least the Court ought to defer that matter until we have the jurors in the courtroom and have them examined and see whether we cannot get 12 impartial jurors and, therefore, I respectfully request and urge that the motion for application for change of venue be denied.

ANSWER OF MR. HENSON TO ARGUMENT BY MR. GUSTAFSON

Mr. Henson: In answer to that argument by the District Attorney, your Honor, I will just touch upon a few items.

So far as the matter of nothing is illegal is concerned, that is not the question at all. Like I started out to say, every person, regardless of guilt, regardless of the evidence, is entitled to a fair and impartial trial. And it doesn't make any difference whether the publications in the newspapers, in television or otherwise were true or not. The fact or question of guilt or innocence is not an issue here at this time, and I say you can't have a fair and impartial jury when they know all the facts, when the case has been argued. And as far as everything being true, Mr. Gustafson says

himself that this report in the Los Angeles Times that a woman swung at Mrs. Duncan with a purse is false. Well, there was certainly one item, and I think if your Honor will look through those newspapers, you will probably find other items that were false and printed in the newspaper. Whether or not this woman actually swung at Mrs. Duncan [fol. 66] with a purse is immaterial. It was printed and people believed it and it's going to affect their minds. If other people have so much prejudice they swing at somebody with a purse, why, they must be bad people.

As far as prejudice against persons of Mexican-Spanish descent, I have been in this County about four years now and I say this isn't a vital item, but it is something to consider, I think, with all the rest of it, your Honor. The first time I ever heard the phrase "high-class Mexican" was when I moved to this County, and I don't know yet what distinguishes a high-class Mexican from an ordinary Mexican, but it must be something.

As far as the trial within 30 days is concerned, your Honor knows that that is only directory and not mandatory. Sixty days is the mandatory statement.

And as far as this assertion by the District Attorney that our affidavits are not sufficient in that they state what other people have said, I think the District Attorney is well aware that one of the exceptions to the hearsay rule is a statement of mental or physical condition, and this was a statement of mental condition, certainly, of prejudice. And he says we don't have any affidavit from anybody who says "I'm prejudiced." Well, as I pointed out before, I don't have a staff of eight or nine attorneys working for me and I don't have four investigators working for me and I don't have time to devote my whole time to this case. [fol. 67] I did the best we could by trying to get people who had talked to a lot of people. As I say, these affidavits are from upstanding, honest people in this community.

I say the motion or application is not premature.

As far as the sentiment or prejudice subsiding by the time of trial, I think as far as court or judicial procedures are concerned, the trial is just around the corner. Five weeks away, that may sound like a lot to a kid going to school, but to a lawyer it is not very long when he has got other cases to consider.

As far as the People are concerned, as Mr. Gustafson said, well, nothing appeared in great detail before the Grand Jury transcript was released, but that means, first of all, they got it once from the officer, the officer's statement to the newspapers; secondly, they have got a more detailed analysis of the testimony from the Grand Jury, and then right on top of it now we are going to have the trial. And I say it won't be a trial. The trial has already been held in this County.

I asked your Honor to give this some very serious thought with all the things in mind that I pointed out on my initial argument. Thank you.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Danch: I have only one more thing to say, your Honor. Mr. Gustafson has placed some emphasis on the fact that the courtroom is only half full. I think the record should show there is a police officer outside the door [fol. 68] keeping people out and that probably accounts for the diminished size of the crowd.

The Court: There is nobody keeping the people out as long as there is seating capacity. We have limited the courtroom today to the seating capacity, that's all.

Mr. Danch: The Deputy Sheriff informed me, your Honor, that he is keeping people out.

The Court: Well, regardless of what the Sheriff tells you, I made an order to that effect and that is what counts and I know that they were going to allow an audience to the extent of the seating capacity. I wouldn't consider that matter of very much importance, anyway.

Mr. Henson: Your Honor, I neglected to say, I just happen to note the Reporter has been going steadily for an hour and a half and probably is tired and would want to take a recess at this time.

Mr. Gustafson: I am ready to conclude.

The Court: Is there anything further?

Mr. Henson: Nothing further from me.

Mr. Danch: Nothing further.

Mr. Gustafson: I have just about two sentences and I am through.

I just want to say that while Mr. Danch said that he conceded there was nothing illegal, improper in what I

did, legally, any statement I may have made, Mr. Henson now says well, that is beside the point, whether it is legal [fol. 69] or not, the only reason I argued the legality and stated it in my affidavit is because in his affidavit he says that we clearly overstepped the bounds of legal propriety, and I deny that we overstepped the bounds of any legal propriety.

Secondly, with respect to the sufficiency of the affidavits, naturally, I do not attack them as insufficient because they are reporting the state of mind of others. I am attacking them as being, attacking the credibility of them and pointing out how impossible it is for me to counter them because not one of these persons had the nerve or the information, or whatever the reason might be, to name any person who said he had formed an opinion. They are all in general terms that persons have talked to me about it and formed an opinion. There isn't one name mentioned. I don't ask Mr. Henson to get an affidavit from a person stating his prejudice, but I would certainly like to have an affidavit by somebody naming the man, naming one man out of 170,000.

That's all, your Honor. I submit the matter.

The Court: Well, is there anything further from anybody?

Mr. Henson: Not from here, your Honor.

Mr. Danch: No.

The Court: What is the situation, Mr. District Attorney, as far as Mr. Sullivan is concerned?

Mr. Gustafson: He hasn't made any application for change of place of trial.

[fol. 70] I believe that is correct, isn't it, Mr. Sullivan?

Mr. Sullivan: I have no motion for change of venue pending at this time.

Mr. Gustafson: He has none.

The Court: All right, the motion is submitted and taken under advisement until next Thursday morning at 10:00 o'clock, at which time I will render an opinion. Thursday morning at 10:00 o'clock.

The Clerk: Thursday, January the 15th.

Mr. Gustafson: Your Honor, I will not be present at that time. In the event that there is any further argument or anything to be had, could it be put over until Tuesday, at 9:30?

The Court: Well, there won't be any further argument. If there is any further argument, we will have it right now.

Mr. Gustafson: No, there isn't any on my part. Thank you, your Honor.

[fol. 71] Ventura, California, January 15, 1959, 10:00 o'clock A.M.

ORAL RULING DENYING MOTION FOR RENEWAL—January 15, 1959

The Court: All right, People versus Luis Estrada Moya and Augustine Baldonado.

Mr. Deem: Ready for the People, your Honor.

Mr. Henson: Ready for defendant Moya, your Honor, who is present in court.

Mr. Danch: Ready for defendant Augustine Baldonado, also present in court.

The Court: Both of the defendants are present, are they not?

Mr. Henson: That is correct, your Honor.

The Court: All right. "In the Superior Court of the State of California, in and for the County of Ventura. The People of the State of California, Plaintiff, versus Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado, defendants.

"Order: Luis Estrada Moya and Augustine Baldonado on the 26th day December, 1958 were indicted by the Grand Jury of Ventura County and accused of murdering Olga Duncan on November 17th, 1958.

"Burt Henson has by this Court been appointed to defend Luis Estrada Moya and John Danch has by this Court been appointed to defend Augustine Baldonado.

"The defendants have been duly arraigned and each has [fol. 72] caused his plea of not guilty and not guilty by reason of insanity to be entered. The case has been regularly set for trial before a jury, trial to begin on the 16th day of February, 1959.

"Each of said attorneys has, on behalf of his client, filed a motion for change of venue on the alleged ground that the defendants cannot receive a fair and impartial trial in the County of Ventura.

"It seems that in filing his motion for a change of venue, each of the defendants has complied with Sections 1033 and 1034 of the Penal Code as to form.

"A hearing of the motion was duly and regularly noticed as required by law and the applications came on for hearing pursuant to said notice on Tuesday morning, January 13, 1959 at 9:30 o'clock A.M. of that day. Burt Henson appeared for his client, Luis Estrada Moya; John Danch appeared for his Client, Augustine Baldonado; and Roy A. Gustafson, the District Attorney of Ventura County, appeared for the People of the State of California.

"The attorneys for the defendants vigorously contend that because of so much publicity having been given through the local press the people of Ventura County have become so inordinately inflamed that a jury cannot be obtained which will give the defendants a fair and impartial trial. And in support of their contention they have filed numerous affidavits and many copies of local and other [fol. 73] newspapers containing articles about the case.

"Each of the attorneys for the defendants has been diligent, industrious and able in presenting his motion for change of venue and Mr. Gustafson has replied to them with admirable ability.

"This Court has carefully read and examined all of the affidavits submitted and has read all of the newspaper articles above referred to. And after carefully analyzing all of the material submitted to me and after diligently and thoughtfully considering the entire case as far as it has developed up to the present time, I am unable to agree with the counsel for defendants in their contention that the defendants cannot receive a fair and impartial trial in Ventura County.

"It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County.

"If I had the slightest doubt in the world about the ability of the defendants to receive a fair trial in Ventura County I would without the slightest hesitation grant the motions for a change of venue.

"But since I have no such doubt the motions are, and each of them is, denied without prejudice to a renewal thereof after voir dire.

"Done this 15th day of January, 1959. Charles F. [fol. 74] Blackstock, Judge of the Superior Court."

You file this affidavit and serve each of the attorneys with a copy of it. You will have to get those copies from my secretary.

Mr. Henson: Excuse me. Your Honor, from your comments I want to make it clear that by making my motion I was in no way reflecting or degrading the character of the people of Ventura County. That was not intended and I didn't ever want to convey that impression. The only impression that I wanted to convey is that as far as I am concerned the people in Ventura County are the best in the world, but that they are human and are going to be prejudiced just like anyone else would be. I hope that is clear in your Honor's mind.

The Court: Oh, that didn't require any explanation by you. When I said it is a sad commentary on the integrity, and so forth, of the people of Ventura County, I didn't intend that the statement on my part should reflect in any way upon the attorneys or upon the parties.

Mr. Henson: Thank you.

The Court: All right, court is adjourned.

Mr. Henson: Your Honor, excuse me, one more thing in this case, as I explained to you before, we are somewhat limited in our investigative capacities and I wonder if the Court would order the jury panel selected at the very earliest opportunity in order that I can make some steps toward investigating, looking at the jury panel because of [fol. 75] the short time or limited facilities that I have.

The Court: Yes. Well, you probably haven't noticed the record, but if you examine the record, you will discover that the Court has revoked the former order calling for 250 names and substituted a new order calling for 150 names.

Mr. Henson: Do you have any idea when those names will be made known?

The Court: No, but I will take note of your request and I will see that the jury is called within a reasonable time.

Mr. Henson: I would appreciate it very much.

Mr. Danch: I have one other problem, your Honor. I have a criminal trial set in this court for February 17th. The defendant in that matter is not in court, but I would like to know if your Honor would consent to a continuance in that matter to another date and, if so, I will have the

defendant in court on the next criminal calendar and make a formal motion at that time for a continuance.

Mr. Deem: If your Honor please, there is a bit of difficulty there. There are two defendants being tried. They are charged jointly. It is what appears to us to be a run-of-the-mill narcotics case.

In view of the fact that Mr. Danch's partner has appeared for him in many of his criminal appearances heretofore, I suggest that possibly that may be the solution here in order that the trial may not be continued beyond the 30-day [fol. 76] period which the Penal Code prescribe, and the two defendants should be tried jointly, in our opinion.

Mr. Danch: In an earlier appearance in this court, Mr. Deem characterized my defendant as the most dangerous man in Ventura County in the last several years, I think was his expression.

My partner has tried one criminal case in his career and doesn't contend to be a trial lawyer and does not intend to be one and my client has hired me, not my partner. I think that he is entitled to a lawyer of his choosing. Since that case was set earlier, I think that if he consents and the other defendant consents, there should be no objection on the part of the People to a continuance of that matter. I certainly can't try both of them at that date.

The Court: The case is set for February the 17th?

Mr. Danch: Yes.

Mr. Deem: Yes, the day after this trial begins.

The Court: And you are attorney for the defendant?

Mr. Danch: Yes, retained, not appointed.

The Court: Well, it goes without saying that Mr. Danch couldn't be present in both trials. He is in this case appointed by the Court. It is a very simple matter to waive time.

Mr. Danch: I will consult with the other attorney and have him consult with his client and if he consents to a continuance, I see no harm in it.

[fol. 77] Mr. Deem: In that event, your Honor, I would request that the Court order both defendants of Vargas and Cabrera into court at the next criminal calendar with their counsel.

The Court: All right.

Mr. Deem: And discuss the matter.

The Court: That will be next Tuesday morning at 9:30 They are ordered to appear in court with their counsel a that time.

Mr. Danch: Thank you, your Honor.

The Clerk: That is January 20th at 9:30, your Honor.

The Court: Anything further?

Mr. Danch: Nothing further here.

The Court: All right, court is adjourned.

[fol. 78] Ventura, California, January 20, 1959. 9:4 o'clock A.M.

ORAL RULING GRANTING MOTION TO INSPECT—January 20, 1959

The Court: People versus Luis Estrada Moya.

Mr. Henson: Ready, your Honor.

Mr. Gustafson: Ready for the People.

Mr. Henson: The defendant is present in court. Th matter comes on at this time, your Honor, for two motion on behalf of the defendant.

I file herewith the original of the motions, supported b affidavits, with a notice of motion.

The first of the motions is concerned with the motio for inspection. This is undertaken under the rule of law of Howell versus Superior Court, with which your Hono is no doubt familiar. The affidavit of the defendant is tha a tape-recording of a statement which he made, he is un able to relate to me the particulars about it and, therefore it being necessary for his defense and necessary for him to refresh his recollection and will probably be admissibl in evidence, the defendant makes a motion to inspect th tape-recording.

The Court: Well, that is one of the motions?

Mr. Henson: That is correct. I though that your Hono would care to rule upon that before we go into the other.

The Court: Well, what do you have to say about that [fol. 79] Mr. District Attorney?

Mr. Gustafson: I have no objection, your Honor. The Deputy Sheriff mentioned in the affidavit of Mr. Henson is present in court. He has the tape-recording with him The defendant and his counsel may listen to it. The only thing I am wondering about is mechanics. The motion of Mr. Henson says that a qualified member of either th

Sheriff's Department or the District Attorney's office be directed to play the said tape-recording and that defendant and counsel be permitted to listen to said tape-recording. I would assume, in the light of the fact that defendant also wants to listen to it in addition to counsel, that it perhaps should be played in the jail.

Mr. Henson: I have no objection. I have no objection where the tape-recording is played.

The Court: All right. The motion will be granted and it is directed that the tape-recording be played in jail. When?

Mr. Gustafson: We are ready right now, any time that counsel wishes.

Mr. Henson: Well, I think right after the hearing today would probably be the most expeditious.

The Court: That is, right after what hearing?

Mr. Henson: Right after Court adjourns here; in other words, 10:00 o'clock, if you want to put a time limit on it, 10:30.

[fol. 80] The Court: Well, that clock up there isn't right.

Mr. Henson: I know. My clock says five minutes to 10:00 now.

The Court: That is about right.

Mr. Henson: I am sure that the mechanics can be worked out as long as the Court makes an order that we be allowed to listen at a reasonable time and under circumstances that make it convenient for all concerned.

The Court: Well, that is all right, or I will name a time certain, if you want to?

Mr. Henson: No, your Honor. I get along all right with the members of the Sheriff's Department and there is no problem there.

The Court: All right. Do you want to make another motion now?

Motion for Continuance and Argument Thereon

Mr. Henson: Yes, your Honor. This is a motion for a continuance and this is supported by my affidavit on file, and I hope your Honor realizes and understands that this motion is not a sham or frivolous motion. I think I have been before this Court enough so that you realize that, as far as I know, I have never done anything to disrupt the

normal processes of this Court. We have a situation here where we have the defendant charged with the most serious offense. We have the District Attorney publicly announcing his opinion that this is murder in the first degree. We have the District Attorney publicly stating his opinion [fol. 81] that this defendant should die. You have read the newspaper accounts of this case in our motion for a change of venue. The District Attorney has represented that those reports are true and if that is so, I think your Honor fully realizes that the defense in this case has a long, tough road to hoe. It just so happens at this time I don't feel that the defendant should die.

As far as time is concerned in my affidavit, I have fully set forth the times correctly when certain proceedings took place in this court, date of appointment and so forth. I objected to the early trial date, when Mrs. Duncan's trial was set, then on the basis that I felt that the Court should give time for public sentiment to subside.

I failed to object when the Court officially set the trial for Mr. Moya, for the reason that Mr. Danch, the attorney for Mr. Baldonado, made an objection to the time and suggested a later date. This was summarily denied, and I didn't feel the Court was inclined at all to set a later date. And I had hopes at that time that perhaps we could be ready for trial.

But now, as we get into the case, I don't see how I can possibly be ready for a trial of this type, having in mind the possible consequences, by February 16th.

There are a number of reasons for this. One of the reasons is that there is a lot of work to do on this case. I don't believe what the District Attorney has represented, [fol. 82] that all the newspaper accounts are true, because I don't think they are; at least, in one respect. One witness, Emma Short, apparently falsely testified before the Grand Jury. This is based upon a statement made by Attorney Charles Lynch of Santa Barbara. So I believe that it will be necessary, since this happened in one case, to interview these large number of witnesses independently the best I can.

Furthermore, we are not engaged in the regular trial of criminal cases or not in trials in general. A criminal case, if it comes along, we take it. If a civil case can't possibly

be settled, why then we have to go to trial. But that is the only reason. We don't do it as a business or anything of that sort.

Then, another thing, we have 150 jurors, perhaps more. If they are going to sit in judgment on this case, we have to have those jurors' background investigated. We can't just go in cold and take the first 12 that come along, not knowing anything about them, and that is going to take time.

And then we have this Section 90.1 of the Penal Code. If a defendant is found guilty of a capital offense, murder, why then there is, we say, a separate trial on the issue of penalty, and in this trial evidence can be introduced of the defendant's background, his past record and things of that sort. This defendant spent the early part of his life in Texas and necessarily it is going to take time to get this [fol. 83] stuff together.

Now, I don't have a Sheriff's Department of at least 125 men to help me. I don't have eight other attorneys working under me to assist me. I don't have four full-time investigators to run this down. Now, I think your Honor realizes that I am in a two-man law firm, and my partner was elected judge of the Justice Court and took office the first of the year, and that consumes a good deal of his time, and I have got to take care of the cases that I had already, in addition to some of his.

Now, we set forth the trials that I have now pending, one for January 22nd, one for January 26th, one for February 6th, and February the 11th. These are just the remaining cases. There are other cases that I have settled, that I have continued, and done the best I could to get rid of them so that I could have time to prepare for this trial. But I have not found it possible to settle or to continue these cases, particularly the one in Los Angeles. If we go off calendar there, you are off for six months. And when it takes a year to get on calendar, to begin with, or to get a case set for trial, you hesitate to continue those kind of cases. But we will make every effort to continue and to settle these cases. I have done the best I can so far, and I can't do any more.

Now, I have also, since I have been out of the District Attorney's office, I thought I have cooperated with the

[fol. 84] District Attorney's office in every way that I knew how, being familiar with their problems. I know they have got a volume of cases. We have advised the defendants to plead guilty when we could have just as well gone to trial. We have waived juries and had court trials, when we could just as well have had jury trials. But a lot of these things we did, having in mind the people I knew working where I have worked.

One of these things was a course for police officers at the Ventura College. I taught this course when I was in the District Attorney's office and I thought it was all over with, except last fall the co-ordinator of the program called up about a week before the course was to commence and said, "We have decided to have another course. We don't have an accredited instructor. Will you take it?" Well, I thought I was doing a favor. There are just two classes left. Today from 12:30 to 3:30 we teach class, and from 7:00 to 10:00; tomorrow from 12:30 to 3:30, tomorrow night 7:00 to 10:00. This isn't in itself terrifically time consuming but it is just another thing, and I have tried to get somebody to take this course. I asked Mr. Deem if he could take it. He had a trial and he advised me that since he was on the committee, it had to be an accredited instructor. I called Mr. Gallagher, who was the only other accredited instructor that I knew, and he said that he had a case pending and couldn't take it.

This point brings me back to the fact that I believe I [fol. 85] have tried to cooperate with this District Attorney's office, and you can ask Mr. Deem there, if you want to, if that hasn't been the case. We have made special trips to waive juries, so far as this court process is concerned, and I felt that we have cooperated fully.

Now, when the shoe is on the other foot, when all I'm asking for is time, why it is the story, "The heck with you, Henson. We got to have trials within 30 days." And this kind of thing makes me start kicking myself for trying to be a nice guy.

I have stated in my affidavit and I am stating before the Court now, that in view of the magnitude of this case, the possible consequence of this case, that I won't be prepared by February 16th. I am not asking for a long continuance.

I asked in my affidavit that I thought four weeks would be sufficient. I am willing to settle for any thing.

As far as this defendant is concerned, I don't think he should die but, if he does, and we have done everything we possibly can, then that is the way it goes. But if he dies and I haven't done everything that I can, then I'm going to feel pretty bad about it and I'm going to feel just as responsible for where he is, as the District Attorney. So I'm asking for time and it is made in all sincerity and in good faith. Thank you.

Mr. Gustafson: Your Honor, I oppose the motion for a [fol. 86] continuance because, in the first place, I don't think there has been a proper showing made entitling the defendant to a continuance. I want to make it clear that so far as I am aware, nobody in my office, and certainly not I, has claimed that Mr. Henson has not been very cooperative in his dealings with the office since he left the office. I don't know what the occasion was for all of the remarks detailing the manner in which he has been cooperative. I suppose that it was with reference to his statement that I have insisted on compliance with the cases and the code section with respect to date of trial of this case. I simply want to tell Mr. Henson that there is nothing personal in this with respect to him or Mr. Danch or Mr. Sullivan or anybody else. It is simply this, that this case, whether Mr. Henson were counsel for Mr. Moya, or anybody else, is one of which should, according to the code section, for the welfare of the People of the State of California, go to trial at an early date. As it is, the Court set the matter for trial beyond the statutory 30-day period, although within the 60-day statutory period. Now, Mr. Henson wants to move it outside of not only the 30-day period but outside of the 60-day period.

He has put it on several grounds that he mentioned. One was that there is an indication that one witness, from a newspaper story, through a denial of a lawyer in Santa Barbara, that one witness may have been mistaken in her testimony before the Grand Jury, and Mr. Henson named Mrs. Short.

[fol. 87] Well, from the transcript of the Grand Jury testimony, it is apparent that any statement that Mrs.

Short made about her statements with Mr. Lynch has nothing to do with Mr. Henson's client, Mr. Moya.

Mr. Henson also states that he is not a criminal lawyer and in his affidavit states that he needs considerable time to prepare to follow the refinements of the criminal law. He has been in the District Attorney's office for several years, left there only recently as Chief Criminal Deputy District Attorney and has participated in several criminal trials, and certainly he is as abreast of developments in the criminal law as anybody in the County.

He says that he is not a trial lawyer and needs time to familiarize himself with trial procedure and evidence, the laws of evidence, to adequately prepare for the above-entitled case. So far as I know, Mr. Henson is a trial lawyer and he is as familiar with the laws of evidence and rules of evidence as any of us.

He says that because this is a very important case and there will be 150 jurors, he needs time to inquire about the jurors. Well, that is what we have a Jury Commissioner for, to select the jurors and to eliminate those that are unqualified, and that is why we will spend, I imagine, many hours here on a voir dire examination of the jurors so that counsel can ascertain whether they should be challenged for cause or challenged on a peremptory challenge. I have [fol. 88] never heard it advanced as any reason for a continuance, that there should be some extrajudicial inquiry with respect to the jurors and that that inquiry is a ground for a continuance.

Mr. Henson says that he is part of a 2-man law firm. Well, I have never understood that as being a ground for a continuance. Certainly on that basis a person who has no partner or associate, as I understand one counsel in this case is in that position, would almost always automatically be entitled to a continuance then, because he had nobody that could take any of his cases.

All of this type of reasoning has been advanced before in different cases and they have been advanced in death penalty cases, in murder cases, and the cases in California are clear with respect to the granting of continuances and the denial of motions for continuances.

In People versus Hall, a 1934 case, at 220 Cal. 166, the defendant, charged with murder and who subsequently re-

ceived the death penalty, was tried within 18 days after his plea. Defense counsel had moved for a continuance on the ground that it was not time enough to prepare for trial. The trial court denied it. The Supreme Court affirmed. That was 18 days. In this case, by Mr. Henson's own affidavit, it is about seven weeks, one day short of seven weeks, from the time Mr. Henson was appointed to this case until the time that the trial begins on February 16th, almost two months.

In another death penalty case, People versus McNabb, [fol. 89] 3 Cal. (2d) 441, the trial was set for 48 days from the time of the plea to the time of the trial, which again is a shorter length of time than is involved in this particular case. In the case of People versus Mendez, 35 Cal. (2d) 537, it was a trial time of about seven weeks, which is the equivalent of about the time in this case, for one counsel, but co-counsel that was hired to try the case was employed only 10 days prior to the date of trial, and the trial court denied a continuance on the representation by the co-counsel that 10 days was not enough to get prepared to try a murder case. The Supreme Court affirmed the trial court's denial of a request for a continuance.

In the case of People versus Dorman, 28 Cal. (2d) 846, the plea was on May 9th, the trial was set for June 16th, in a first degree murder case. The court reviewed many, many cases in this; that is, the Supreme Court, with respect to what is proper in granting or in denying a motion for a continuance, and did affirm this conviction and said that this was not any violation of any constitutional rights, statutory rights or anything else, to require that the defendant go to trial in first degree murder charges within five weeks after his plea, from May 9th to June 16th. That is a 1946 case.

And one of the latest cases on this is People versus Davis, 43 Cal. (2d) 661, where the trial time was from June 22nd, the date of plea, to July 15th, although that was not a [fol. 90] murder case but it was an abortion case.

So I think the authorities are clear that much less time than has been allowed in this case is a proper amount of time to prepare for a murder trial.

I will point out, in contrast, Mr. Henson cites no authorities for his proposition that he is entitled to a con-

tinuance longer than the seven weeks of which he will already have been preparing this defense by the time this case comes to trial on February 16th.

Finally I want to point out, your Honor, that I think that this motion is improperly before the Court at this time. There are two co-defendants here. This is a joint indictment against all three defendants. It will be a joint trial unless the Court specifically orders a severance. If this Court postponed the trial or continued the trial from February 16th to some other date, it would be the trial of the three defendants, not just the trial of Mr. Moya, because they are joined. The trial, the joint trial, is set for February 16th.

Mr. Henson, so far as I am aware, has not served notice in accordance with Section 1050 of the Penal Code on the two co-defendants. At any rate, they do not appear in court here today nor are their counsel here, and thus if the Court should grant any motion made by Mr. Henson for a continuance in this case, without notice to the co-defendants, and at a time subsequent to the statutory period, I think that it would be without the jurisdiction of [fol. 91] the Court to do so and I think that it would be error, particularly since the co-counsel were not given any notice of the matter.

Consequently, on the grounds that there is no showing of merit for the motion on either factual or legal grounds and, secondly, that it is improperly before the Court right now, I respectfully ask that the motion for a continuance be denied.

Mr. Henson: Insofar as the last statement that this motion is improperly before the Court, I believe, your Honor, and certainly Mr. Gustafson, too, will realize the mechanics of this thing. All right, Mr. Sullivan is in Los Angeles. Mr. Danch is apparently out of town, because his partner appeared for him in a case just a minute ago. And that is no reason for denying the motion at this time. If your Honor feels there is any merit to my motion, why it will be just a simple matter of setting the matter up for Thursday at the regular criminal calendar and resetting the case. Certainly Mr. Sullivan, when the case was first set, requested more time. Mr. Danch, too, requested more time at the last hearing on this matter, so there won't be

any problem in that regard. It is simply a mechanical problem of telephoning co-counsel or counsel for the co-defendants and getting them here Thursday and continuing.

Now, there are no other mechanical difficulties involved. You haven't summoned the jury yet and it is not going to inconvenience anybody that I can see, whereas it is going to [fol. 92] be a terrible inconvenience upon the defendant, who I think is certainly an important figure in this case, and it is going to be inconvenient on my part, as I have already pointed out to the Court.

As far as not citing authority is concerned, it is a discretionary matter with the Court and just about anything you want to do will be upheld by an Appellate Court. I am only appealing to your sense of fair play in considering the facts of this particular case. So the fact that there is no authority, is no reason for denying the case, denying the motion. I feel, your Honor, just like I stated in my opening argument, that it is not going to inconvenience anybody to have a short continuance of this case. This motion is not made to impede the normal processes of this Court. It is made on good grounds. It is made in good faith. It is not going to inconvenience anyone, whereas it is going to be a vital and perhaps lethal inconvenience to the defendant. Thank you.

The Court: I don't have any doubt whatever but that the motion is made in good faith. I don't think any of the attorneys connected with the case think the motion is made in bad faith.

This is, of course, a very unusual case. It has received a great deal of notoriety, and that notoriety has happened not only in Ventura County but you can safely conclude that it has happened in every county in the State of Cali- [fol. 93] fornia. This case probably is one of the best known and notorious cases—one of the most notorious, anyway—that has ever happened in Ventura County, and the County was inaugurated in 1873. They had a very notorious case here in 1877. It was the murder of Thomas Moore up in the Fillmore country, People versus Sprague, et al., and there was all kinds of notoriety in that case, of course. That case was probably just as notorious, maybe more so even, if possible, than this one.

There is some prejudice undoubtedly, but it is not against the defendants. I think people overlook that fact that the

prejudice in this case is against the crime, not against the defendants. These defendants are presumed to be innocent until they are proved guilty beyond a reasonable doubt and to a moral certainty. There is prejudice against the crime. Who isn't prejudiced against a crime of this kind? That doesn't mean that there is prejudice against the defendants.

There certainly wasn't any prejudice against the defendants so far as this Court is concerned. If there had been, Mr. Henson never would have been appointed to defend Mr. Moya. I selected Mr. Henson with meticulous care, even for the very reason that I knew he was an experienced, able attorney, familiar with criminal procedure and criminal affairs. I knew, of course, that he had several years in the District Attorney's office and was Chief Deputy District Attorney, and I knew that the case had received a lot of [fol. 94] notoriety and I had a feeling that the defendants, especially in this case, were entitled to a good, capable, able attorney. That is the reason that I selected Mr. Henson. When I named Mr. Henson, he wasn't the next lawyer in order. I went outside of the usual line in order of selection and selected him, especially because of my exalted opinion of his ability as a lawyer and especially as a lawyer in a criminal case.

So I am thoroughly satisfied that Mr. Moya will receive a very able and thorough defense in this case. And he is entitled to an able and thorough defense. He is accused of a serious crime, a very revolting crime, so far as the crime itself is concerned.

But there is nothing about the crime itself from which it could be concluded that Mr. Moya is guilty. It might be that someone else committed this revolting crime. He is presumed to be innocent and so far as I am concerned, he is innocent and he is going to continue to be innocent, until he is proved to be guilty in a legal way beyond a reasonable doubt and to a moral certainty.

So all this matter about prejudice and taking more time in order to allow the prejudice to cool off and to be allayed, I don't have any sympathy with that all. I don't think there is anything in it. If this case were tried way up north in one of the northern counties, Sierra County or Humboldt or any other place, there would be the same prejudice that there is here. There wouldn't be the slightest difference in [fol. 95] the world, in my opinion. That is the reason that

I denied the motion for change of venue, and the more I think of it, the more certain I feel that I was correct in denying that motion.

ORAL RULING DENYING MOTION FOR CONTINUANCE

So while I sympathize with Mr. Henson, who is appointed to represent this defendant, and it is going to take a lot of time and energy and there is no question about that, and he is rather a busy lawyer—I couldn't appoint an able lawyer without appointing a busy lawyer—I am satisfied that there is no merit in the motion, and the motion is denied.

[fol. 96] Ventura, California, January 29, 1959. 9:35 o'clock A.M.

COLLOQUY ON MOTION TO WITHDRAW PLEA OF NOT GUILTY AND GRANTING THEREOF

The Court: People versus Luis Estrada Moya et al.

Mr. Henson: Ready, your Honor.

Mr. Gustafson: Ready for the People.

Mr. Henson: The defendant is present in court. The matter comes on at this time for a motion on the part of the defendant, which I will read. This is a motion to withdraw a plea of not guilty, Penal Code Section 1018.

"I, Luis Estrada Moya, hereby move the above-entitled Court to withdraw my plea of not guilty heretofore entered to an indictment which charged me with a violation of Section 187 of the Penal Code, murder.

"I understand that a withdrawal of my plea of not guilty means that I am admitting the violation of Section 187 of the Penal Code, murder, and I understand that my plea of not guilty by reason of insanity still stands.

"I further understand that the offense which I am admitting can be punishable by death or life imprisonment.

"I also understand that I have the right to a trial on the issue of penalty, wherein it will be decided whether I shall be punished by death or life imprisonment.

"I further admit that the violation of Section 187 of the Penal Code is murder in the first degree and that it was willful, deliberate and premeditated within the legal

[fol. 97] definitions thereof, as explained to me by my attorney, Burt M. Henson.

"I have been duly advised of the legal consequences and the legal effect of this motion by my attorney. I have been offered no promises of immunity by any legal authority, by making this motion.

"This action is undertaken by me because it sets forth the truth, as I see it, under the laws of God and man.

"This action is of my own free will and accord.

"(Signed) Luis Estrada Moya."

Is that still your desire, Mr. Moya?

The Defendant: Yes, it is.

Mr. Henson: I will offer this motion to the Court.

The Court: All right. I don't suppose that the District Attorney has anything to say?

Mr. Gustafson: No, your Honor.

The Court: The motion is granted.

MOTION FOR A SEPARATE TRIAL, GRANTING THEREOF AND SETTING CASE FOR TRIAL

Mr. Henson: There is another motion at this time, your Honor, and that is a motion under the provisions of Penal Code Section 1098, and that is a motion for a separate trial, and the defendant moves the Court for a trial separate from defendants Elizabeth Ann Duncan and defendant Augustine Baldonado on the issue of penalty and insanity. I will submit that motion to the Court.

Mr. Gustafson: Your Honor, inasmuch as by the withdrawal of the plea of not guilty, the issues with respect to this defendant will be considerably different than they [fol. 98] will with respect to the other two defendants remaining in the case, I have no objection to a separate trial for this defendant on the issue of penalty, and I would suggest that the trial be set for a time, if defendant is willing to waive time in this matter, to set it for April 20th.

Mr. Henson: The defendant will waive time in the matter. Is that correct, Mr. Moya?

The Defendant: Yes.

Mr. Henson: And the date of April 20th is satisfactory.

The Court: All right. The motion is granted. The motion on the trial on the issue of penalty is granted.

The Clerk: And insanity?

Mr. Gustafson: Penalty and insanity.
The Court: Penalty and insanity.
Mr. Gustafson: And I would suggest a hundred jurors for that trial, your Honor.
Mr. Henson: I believe that that will be satisfactory.
The Court: Let's get a date for this trial. When is it?
The Clerk: April 20th at 10:00 o'clock.
The Court: April 20th?
Mr. Gustafson: Yes, April 20th.
The Court: All right. And let 100 prospective jurors be summoned.

[fol. 98a] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF VENTURA

No. CR 3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

LUIS ESTRADA MOYA, Defendant

APPEARANCES:

For the Plaintiff: State Attorney General By: Deputy Attorney General Ernest E. Sanchez.
For the Defendant: Burt Henson.
Reported by: Esther Bruner, C. S. R.

[fol. 99] Ventura, California, April 14, 1959. 9:30 A.M.

MOTION TO QUASH SUBPOENA AND ARGUMENT THEREON

The Court: The People versus Luis Estrada Moya.
Mr. Henson: Ready, your Honor.
Mr. Sanchez: Ready, your Honor.
Mr. Henson: This matter comes on at this time on motion of the Attorney General to quash a subpoena which will be served upon Warden Fred Dixon of San Quentin, and I would like to file herewith a declaration which is the same as an affidavit and a memorandum of points and authorities in opposition to the motion to quash the foreign subpoena.

Mr. Gustafson: May I be served?

Mr. Henson: I don't think there is any requirement that you be served, but if you do so request, I will. Since the motion was made by the Attorney General, let him make whatever remarks he wants to make.

STATEMENT ON BEHALF OF PLAINTIFF

Mr. Sanchez: Your Honor, I would like to state that we make this motion not out of any desire to proceed on merely technical grounds or to obstruct the court of justice or the deliberations of this court, but, as we have stated in our notice of motion, our written motion of the the points and authorities, which we have filed in support thereof, we feel that there is an important principle of law involved in this subpoena. What has occurred here is that the defendant has subpoenaed a responsible public official the Warden of San Quentin Prison. The Warden who re- [fol. 100] ceived the subpoena doesn't know the defendant. He does not know anything about the crime, and that we contend he cannot testify in any relevant or material particular to the issues which would probably be considered by the court. He doesn't know the man, and he doesn't know what the man did. We stand, therefore, on the very simple and fundamental proposition that in this State and in any State, no witness can be compelled to testify if he does not know anything material or relevant to the issues at bar; furthermore, we point out that the Warden of San Quentin Prison is a quite responsible public official. If he can be subpoenaed in this case, he could legitimately be called to testify in any capital case which occurred within the State of California, and thus would spend the major part of his time traveling back and forth throughout the State giving testimony as to these crimes. We feel there is no justification for interfering with the Warden's duties in such a manner where he obviously and clearly cannot give material testimony.

Those are the two principle bases of our objection, your Honor. We have listed other bases in our memorandum of points and authorities, and we rest upon what I have just said and upon our written motion on file. I have just been served with the reply memorandum on the part of Mr. Henson, and if the Court desires, I will present any answer

which we might have by means of letter at the discretion of the Court.

STATEMENT ON BEHALF OF DEFENDANT

Mr. Henson: Your Honor, I think we have to start with [fol. 101] the basic proposition that it's a pretty serious constitutional right that the defendant has to subpoena any or all witnesses on his behalf to testify at this trial, and these witnesses have to appear, that's the only way that justice can be administered is to command witnesses to appear, because in this case, like any other case, witnesses don't want to leave their jobs and their duties and their homes to come here and testify because it's just an inconvenience to them. In this case, particularly, the constitutional right to live is involved too, so you have some very serious constitutional rights involved, and a violation of these would be a violation of the due process.

I realize that Warden Dixon is a responsible official, and I talked to him myself, as you will see, in my affidavit, I told him that I knew he was a busy man, but that I felt it was vitally necessary that he come here to testify, that we would make any arrangements we could minimize the time that he would have to spend here. I agreed to telephone him or telegraph him 24 hours ahead of time or make allowances for this and that so that we would not be sitting through the whole trial and wasting his time. As far as administrative inconvenience is concerned, I don't know of a single case where a subpoena has been quashed just because it was going to be inconvenient to the witness. If that were the case, every subpoena would be quashed. If it is a secondary consideration, then I think we have to wait and consider the inconvenience to the defendant [fol. 102] too, in view of the serious nature of the crime and the serious results.

The primary question, I believe here, is whether or not the testimony of Warden Dixon is going to be material to the issue of penalty, and I feel strongly that it is. I know your Honor is familiar with Section 190.1 of the Penal Code, which was just adopted a couple of years ago, and it states that after a defendant has been convicted of an offense which can be punishable by death, that there shall be a separate trial on the penalty. If I may quote directly

from the Penal Code section, it is that evidence may be presented after further proceedings on the issue of penalty of circumstances surrounding the crime, the defendant's background and history, and of any fact in mitigation of the penalty.

The clear legislative intent of this section, I believe, had many purposes in mind. First of all, they wanted to eliminate the so-called silent verdict so that a person wasn't sentenced to death merely because the jury didn't make any recommendation for life.

Secondly, it was to give the tryer of fact a broad background with which to exercise its discretion, and it was also to give the tryer of fact complete and absolute discretion.

The cases interpreting this section, which are set forth in my memorandum of points and authorities, have held [fol. 103] that the discretion of the tryer of fact is absolute so that they may consider just about anything they want to in the penalty trial.

Now, several years ago, it became the practice of the Court to instruct the Jury that a person sentenced to life imprisonment was eligible for parole after so many years. First it was nine, now it's seven, and this was argued very strongly, very strenuously by District Attornies, "Really, what choice is there? What is seven years? I can do that standing on my ear," to quote the present District Attorney in the case just completed, so that in the People versus Green case, where the argument of the District Attorney was complained as being error because he argued this way, the Court said, "Well, I don't see why the Defense didn't introduce evidence concerning the minimum, medium, and maximum terms for which a person may remain in prison under a life sentence, "so, certainly, this opened the door so that the whole question of punishment, life imprisonment, evidence pertaining thereto should be admissible, that is where the defendant spends his time, what is he going to be doing while he is being imprisoned, whether he is going to be working, whether he is going to be playing baseball, or whatever he is going to do would have a direct bearing upon whether or not the Jury should give a man life imprisonment. Now, if the Jury is going to be vested with this absolute discretion, it seems to follow that they should know everything there is to know about

[fol. 104] the two punishments, life imprisonment and death, and just how the death penalty is administered in California would certainly be an important item.

If your Honor will look at page 3 and 4 of the memorandum of points and authorities, in People versus Friend, a recent case, the Court said, "It is within their discretion alone to determine, each one himself, how far he will accord weight to the consideration of the several objectives of punishment of the deterrents of crime, the protection of society, the desirability of stern retribution or of sympathy or clemency," etc.

I personally feel that the way the death penalty is inflicted in California would have a direct bearing on how a person feels about retribution. The way it's done would not be carried out in any retributive way, because it's done very quietly and it's all organized, nobody is mad at anybody, and just a mechanical promise, so retribution cannot be involved. If a person believes that the death penalty should be inflicted by reason of retribution, it isn't done that way.

As far as deterrents are concerned, the argument has been put before the court on many occasions that to give one person the death penalty deterred somebody else from committing a crime, and the way the death penalty is inflicted in California has no bearing on deterrents because [fol. 105] it's not publicly viewed. There are just certain people that are entitled to be present. The only person that is required to be present is the Warden of San Quentin Prison. He, I feel, is the only qualified person in California to testify to that. Sure, people have sat in the little room there and watched a man coming into the little chamber and watched them put the sack over his head and so forth and it's all over with, but the Warden is the person who can describe how the day before the man is put in this separate cell, how that night there are two guards that watch him the whole night, and these little things, like he gets what he wants to eat, whatever books he wants, and so forth. This, the Jury should know, if they are going to play God, and they are playing God when they say that this man should die or this man should live. Why shouldn't they know all there is to know about what life imprisonment means? That has already been established by the court. Why shouldn't they know what death means?

The memorandum here wasn't argued by the Attorney General, but he said that the Warden is being called as an expert witness, but that's not true. I do not intend to ask him any opinion concerning his views or anything else. He is only being called as a persipient witness to the fact that how the death penalty is administered in California and the argument that he is going to be called on every capital case in California to testify can certainly be easily [fol. 106] remedied.

COLLOQUY BETWEEN COURT AND COUNSEL FOR DEFENDANT

The Court: Don't you think that the court takes judicial notice of how the death penalty is administered in California?

Mr. Henson: I don't see how you can, your Honor.

The Court: It is a matter of common knowledge.

Mr. Henson: Legally, but you ask some people how it is administered and they will say by hanging or the electric chair.

The Court: That doesn't mean that everybody on earth has to know what it is.

Mr. Henson: Why shouldn't the Jury know about it?

The Court: The Jury will know. In my opinion, the Jury will know all about it.

Mr. Henson: How will they know it, your Honor?

The Court: How will they know?

Mr. Henson: Yes, if I don't present evidence.

The Court: The same way that you know. It is a matter of common knowledge.

Mr. Henson: I didn't know about it until I went to San Quentin myself and looked at the gas chamber and the Warden took me through there.

The Court: When you were in the District Attorney's Office, you must have known something about it.

Mr. Henson: Everybody wasn't in the District Attorney's Office, and I don't see—what harm is it going [fol. 107] to do?

The Court: I am just asking you a question. Don't you think that it is a matter of common knowledge that the court takes judicial notice of how the death penalty is administered?

Mr. Henson: I don't think so, your Honor. It is done in different ways. One state still does it by the firing squad,

many do it by hanging yet, and many states do it by electrocution.

The Court: In rendering sentence and pronouncing judgment, the court says how it is administered, by a lethal gas. That is the law of the State of California, and everyone is presumed to know the law.

Mr. Henson: There is a lot more to it than that, your Honor. Everyone is presumed to know what life imprisonment is, but it still doesn't prevent people from introducing evidence to show what it really is.

The Court: I can't conceive of any member of the Jury not knowing what death is.

Mr. Henson: We know what death is all right, but it makes a great deal of difference just how it is inflicted. If you are going to torture somebody to death, that is one thing.

The Court: They changed the penalty in California from hanging to execution by lethal gas on the ground that it was more humane.

[fol. 108] Mr. Henson: That's right. Somebody might not think it's humane.

The Court: It is apparently similar to taking an anesthetic. It's the most humane way that has ever been devised recently to execute criminals.

Mr. Henson: That is true. Myself, I would just as soon have a firing squad as to go in there——

The Court: Everybody knows about it, as well as the Warden of San Quentin. It is common knowledge.

Mr. Henson: Yes, but there is something more to it, your Honor, it's the leading up to it. The man sits in Death Row for a number of months. Like I say, the day before they go through this fantastic ritual which is just utterly ridiculous, and I think the Jury ought to know about this.

The Court: The way it is administered is a matter of law. It is the law of the State of California.

Mr. Henson: Well, there is a law that a person in life imprisonment was eligible for parole after seven years, but the Supreme Court itself says that the defendant should have introduced evidence just how much, what the average time is, whether just how much, what the average time is, whether anybody actually gets out after seven years, or whether they serve twenty years, or anything like that. The

Jury is entitled to know that, even though as a matter of law they are eligible for parole after seven years.

[fol. 109] The Court: Well, the Jury knows that. The Jury are told that anyway.

Mr. Henson: The Jury are told that, but the Defense still can introduce evidence to show that a person doesn't, has no right to get out after seven years, that they frequently serve fifteen, twenty, thirty-two years, just so the Jury doesn't get the wrong impression that every person gets out after seven years.

The Court: If necessary, the Jury can be told how the death penalty is administered at San Quentin.

Mr. Henson: Well, if I prepare a written statement to that effect, or better than that, I will get a motion picture; will you show that?

The Court: No, we are through with motion pictures. We have had too many already.

Mr. Henson: I mean I can acquire a film that was filmed in San Quentin with Warden Dixon in it. That shows the exact steps that a person goes through in administration of the death penalty. Now, will you allow me——

The Court: If the death penalty is to be administered at all, is there any more humane way of doing it?

Mr. Henson: It is everybody's individual opinion. I wouldn't want to die by gas.

The Court: Can you name an easier death?

Mr. Henson: I would say it is an individual opinion your Honor. I would just as soon stand up and face a firing [fol. 110] squad as to go into that cell and have them throw a sack over my head and wonder what is going to happen. What is humane and isn't humane is anybody's individual opinion, the same thing you are asking the Jury to do here. They must have the opinion that it is——

The Court: You have to argue to the Jury in the effect that the law in California, with respect to administering the death penalty is wrong. Do you think you are permitted to argue that to a Jury?

Mr. Henson: I don't know. Why not?

The Court: It is the law of the State of California that whether it is wrong or not is for the legislature.

Mr. Henson: That's right, but I don't see any reason why I can't argue that the law isn't any good, just like the District Attorney argues that the Adult Authority is no

good, they let people out too soon. They are created by law, and yet he gets up and argues here that they——

The Court: That is a different matter.

Mr. Henson: I don't see how it is.

The Court: He has a right undoubtedly to tell them that a person accused of murder in the first degree and convicted and sentenced to the penitentiary for life doesn't necessarily serve life. He is out in seven years maybe, or a little more. I don't think there is any question about that.

Mr. Henson: Yes, but I'm answering your argument [fol. 111] that it is a matter of law, and you can't argue the law. In this last case here, the District Attorney——

The Court: I didn't say you couldn't argue the law, but you are confronted with the law, whatever it is, and whether that law is good or bad, it is not up to the Jury.

Mr. Henson: Well, it certainly could be commented upon.

The Court: It is up to the legislators of the State of California.

Mr. Henson: Yes, but it can be commented upon as to its application in this particular case, certainly. It is done every day.

The Court: That is possible. I am not ruling on that. I can see that that is probable that it can be commented upon, but that doesn't mean that you can call a witness to show that a law is bad.

Mr. Henson: No, I don't intend to do that in this case, to argue that the law is bad perhaps.

The Court: You say, yourself, right here, that you are going to call him to show how the death penalty is administered at San Quentin.

Mr. Henson: Right.

The Court: The court takes judicial notice, in my opinion, how the death penalty is administered at San Quentin. It is a matter of common knowledge. We just can't assume that people are ignoramuses. I am just talking to you. [fol. 112] I'm not ruling.

Mr. Henson: Well, I don't know who is an ignoramus or who isn't, but I sure was ignorant of the whole thing until I saw it myself, *it* saw a film about it.

Take in the Duncan case here, the question came up that one of the witnesses here thought or quoted somebody as saying, "Mrs. Duncan, you do that and it will mean the

electric chair," so evidently some people still think we do it by the electric chair in California.

The Court: Let's assume that you have the Warden of San Quentin here and you put him on the witness stand and you ask him in effect, "How is the death penalty administered at San Quentin?"

The District Attorney objects to the question on the ground that it is incompetent, irrelevant and immaterial. Nine chances out of ten, the objection will be sustained.

Mr. Henson. You are going to be ruling on it, your Honor.

The Court: I know, but I'm just saying that I can't see that it would be material.

Mr. Henson: Well, the same question you would ask yourself when the Warden was testifying here is the same question you are asking now. If your Honor would like to think about it a little bit and see whether it is material, and how you would react if somebody objected to that question. I think it is something, your Honor, we just can't make a [fol. 113] snap decision on. This Section 190.1 hasn't been in existence very long. It's only been a little over two years since the Section was enacted, and so the courts don't know exactly how to rule on this sort of thing.

The Court: Well, a good many people have been executed under the present rule.

Mr. Henson: Yes, but there have been a lot of cases decided on appeal too, where courts gave different interpretation of Section 190.1, and some courts complained about the fact that there was no guide post for the Jury in the exercise of that absolute discretion they had. I think it gets down to this, your Honor, that here is a man who is on trial for his life. The Jury is going to be playing God as far as he is concerned. They are going to say whether he is going to live or die, and why shouldn't they be allowed to know just how he is going to die, if they sentence him to die, or what he is going to be doing, how long he is going to serve if he is given life imprisonment. Now, I know, as far as Warden Dixon is concerned, he wouldn't be called all over the State on this sort of thing. They can make some sort of arrangement just like the Adult Authority has in these cases, have some executive officer or something like that come down and testify, so he is not going to be

bounded to death all over the State. If he wants to appoint somebody else to come down here and testify as to how it is administered, that is fine with me, but when I served him I thought that he was the only qualified person [fol. 114] in the State of California that could testify to it. The former Warden Dietz died, and Warden Duffy before that, it has been some years since he has been a witness, and he is probably a more important official than Warden Dixon since he is of the Adult Authority, so I feel that it is vitally necessary. How can you ask somebody to send some person to death if they don't know how it is going to be done? It would make a difference to me.

The Court: I think the Jury, as I have already said, I think any Jury, any person that is fit to be on a Jury, will know how it is done. It is a matter of common knowledge.

Mr. Henson: I doubt that.

The Court: They take judicial notice of it. That is the way I feel about it just at the moment, but I am not ruling that way.

Mr. Henson: Well, if your Honor would care to think about it, we can—of course, if your Honor will make some commitment ahead of time that we can show a film of just how it is done, why then we would withdraw the subpoena.

The Court: I doubt very much if you would be permitted to do anything of that kind, but unless you want to say something more, let me hear further from the Attorney General.

STATEMENT OF BEHALF OF PLAINTIFF

Mr. Sanchez: Your Honor, to clarify things just a little [fol. 115] bit, let me point out that this is not a matter of constitutional right. I think that the authorities are quite clear on that, that a witness has—pardon me, that a party has a constitutional right to summon witnesses in his behalf only where the testimony to be given by those witnesses is material and relevant, so if the testimony which the Warden can give is not relevant and material, the constitutional rights of the parties are not affected whatsoever by quashing this subpoena, so the whole question comes down to this problem of materiality. Let's ask ourselves again, what can the Warden say? It's fairly clear now that the only thing that he can say and what he will be

asked to say is to describe the physical method of the execution of the death penalty. Well, is that material? We submit that it is not. Let's look at Section 190.1. What does it say? It says that the Jury has the right to impose the penalty. Now, they are not playing God. They are only exercising the power given to them by the legislature. They can impose a sentence of death or they can impose a sentence of life imprisonment. They can choose that penalty which is severe, or they can choose one that is less severe, and in order to help them make that decision, the legislature has decreed that evidence can be introduced concerning the circumstances of the crime, the background of the defendant, and facts in mitigation and aggregation. Now, we submit that the clear meaning of this section and [fol. 116] the clear inference to be drawn from these words is that the jury is supposed to consider those facts and circumstances about the defendant and what he did which would enable them to decide to impose a severer penalty or a less severe penalty. We do not think that they are compelled or even desired to weigh and decide or make any judgments as to the relative merits of the penalties themselves as a matter of criminalogical science. They only have one choice, to punish severely or to punish less severely, and they are a target to evidence which will enable them to make that choice. We feel that that kind of evidence means the history and background of the defendant, the circumstances of the crime, and the facts in aggregation or mitigation which might incline a reasonable man to feel that a person who committed this crime should be punished more or less severely.

Now, Counsel has argued on one hand that he desires Warden Dixon to appear and testify because he is the only persipient witness in California to the administration of these sentences, "the only man who is required to be there as a matter of law," I think, was his exact phraseology, but, on the other hand, he then says that the Warden would not be required to appear in other cases of like nature because some method of substituting for his testimony might be evolved, such as permitting another official to testify. It seems difficult to see how he could be so necessary in one case, and not be required in the future. It [fol. 117] would appear that if the man is truly the only persipient witness that he would of necessity have to be

called in similar situations whenever a similar case arose.

I think, your Honor, that that basically sums up our position. Presented from all considerations of impositions upon the Warden, administered necessity, and things of like nature, the key here is whether or not the testimony is material, whether or not this kind of testimony will enable the Jury to give a fair and just verdict, and whether or not any essential rights of the defendant is imposed upon or limited by the quashing of this subpoena. We think that the quashing of the subpoena would have none of these results, that clearly any description which the Warden might give could not be properly considered by the Jury because it doesn't pertain to Luis Moya, his background or character, and it doesn't pertain to what Luis Moya did, and, therefore, is not something which the Jury should consider in deciding to impose either a severe or less severe penalty on Luis Moya or his actions.

The Court: The matter is submitted. I will rule on it sometime during the day.

[fol. 118] Ventura, California, April 16, 1959. 9:30 o'clock A.M.

The Court: Are we taking care of this Baldonado matter or this Moya matter?

Mr. Deem: Yes, if your Honor please. The People are ready.

The Court: People versus Moya.

Mr. Henson: Yes. Ready, your Honor.

Mr. Deem: Ready for the People, Your Honor.

MOTION FOR CHANGE OF VENUE AND ARGUMENT THEREON

Mr. Henson: Your Honor, this matter comes on at this time for another motion for a change of venue, which I will file with the Court at this time. The District Attorney has been regularly served with a copy of the application and the declaration in support thereof.

And in connection with the declaration I have a number of exhibits here which are incorporated by reference into the declaration and which are sitting here on the Clerk's desk and I ask that they be filed also.

The Court: All right.

Mr. Henson: Your Honor, I am not going to spend much time on this because we have been over this before, but the time is drawing nigh and I would — your Honor to give this matter some further consideration. And first of all, let me say that I mean in no way to reflect upon the humanity or the decency of the people of this County. I think [fol. 119] it is rather a compliment to the people of this County because I know that they are not ignoramuses that don't read the newspaper or don't listen to the radio or don't watch television. I don't think that the people of this County are superhuman in that they can suddenly wipe their minds clean of all that has happened in the last three months.

What has happened in the last three months your Honor is well aware of and I think you are well aware of the publicity that has been given to the Elizabeth Duncan case and to the Baldonado case and Your Honor is very well aware of the results of those cases, both resulting in death penalties. If I have heard this expression once, I have heard it a number of times, and that is, "One down and two to go. Two down, one to go".

And just speaking in generalities, I wish your Honor would take a look at some of these exhibits that we have filed here.

The Court: They are all Ventura County papers, aren't they?

Mr. Henson: No, they are not, your Honor. Some of them are—the bulk of them are Ventura County papers. There are some from Santa Barbara County. There are some from Los Angeles, that are published in Los Angeles County, but they all are circulated in some degree or another in this County. And they carry photographs of the court room procedure and glaring headlines that fit [fol. 120] into the pattern that started back in December when the officers reported every facet of this case, every facet of the investigation to the press and it was published in the press.

The District Attorney made remarks before the case was ever presented to the Grand Jury to the effect that the perpetrators of this crime should be given the death penalty and by matter of coincidence that declaration of the District Attorney ran alongside the headlines, "Baldonado Confesses to the Murder" and "Baldonado's Confession

Implicates Moya and Elizabeth Duncan." So the statement of the District Attorney before, that he was only referring to the perpetrators, I think you have to take the whole thing into consideration when you say "the perpetrators" and then right in the next column there is a big story about Baldonado confessing and implicating Moya and implicating Elizabeth Duncan. I think you can put two and two together. At least I think the average reader would.

So the ball started rolling. The press, particularly the Ventura Star-Free Press gave the Duncan trial a publicity build-up that was reminiscent of some big theatrical production. Two weeks before the trial ever commenced they started describing who the attorneys were and giving run-downs on them and told about all the separate press room facilities, and so forth, and built it up into a big production. And all of the newspapers took advantage of your Honor by photographing various scenes in the courtroom that [fol. 121] gave a vivid portrayal to everyone as to what was going on. And you know the amount of spectators that was standing outside this courtroom every morning.

The Court: Everybody, the public had a right to know what was going on.

Mr. Henson: They had a right to know what was going on, but, I don't think the—yes, I say everybody has a right here to know what is going on. The papers had a right to print what was going on, but what I am worried about is the result, and the result is that everybody in this County I believe that reads the newspapers and is intelligent enough to talk or listen knows what this case is all about, and it has gone on for such a long time now, at least three months, that if they don't have some opinion formed by this time, subconsciously, anyway—I just can't imagine anything different.

The Court: Well, opinions formed from newspaper articles are immaterial, anyway.

Mr. Henson: They might be immaterial legally, your Honor, but, actually, they certainly are material and I think your Honor will agree with that, won't you?

The Court: That the newspaper articles are material?

Mr. Henson: I am saying that they are actually material as to a person's state of mind. I read a newspaper. I read the same newspaper three months and I hear of nothing on the front page except the Elizabeth Duncan case,

[fol. 122] Baldonado case and the Moya case. How can I help but forming some opinion?

The Court: Well, they are somewhat material in the sense that you are using it, but legally they are immaterial.

Mr. Henson: Well, in any event——

The Court: Another thing, I don't think you would find any difference in any County in California than you will find right here in Ventura County. The people in the other counties aren't any more ignorant than the people in this County. This case, of course, just as you say, is very notorious and received a lot of notoriety and publicity.

Mr. Henson: I don't think the people in other counties have been subject to the same day-by-day barrage of newspaper articles and being right here.

The Court: They read the newspapers. They have been published in the newspapers all over California.

Mr. Henson: I know they have, but not to the degree that they were published in this County.

The Court: Possibly not quite the degree, but I don't think that makes any difference.

Mr. Henson: And the People in this County——

The Court: One time we had a case up here in Santa Barbara. I think it was People versus King, who killed an editor named Clancy. They tried the case in Santa Barbara and I think they got a hung jury and then they got a change of venue to San Mateo County and the jury in San [fol. 123] Mateo County convicted him the first time. He got a new trial afterwards, but I don't think you will find any difference in any other County than you have right here in Ventura County.

Mr. Henson: Well, here is one of the things I am worried about, is the personal relationship here. Now, there were a hundred and some odd jurors summoned to appear on the first Duncan case and there was the same amount appeared on the Baldonado case and all their names and their pictures were put——

The Court: And besides, your client has pleaded guilty. He has already pleaded guilty.

Mr. Henson: Well, sure, but the most important thing is to come up, whether he is to live or die.

The Court: Well, the question of penalty, that is up to a jury. I think you can get just as fair a jury here as you can any place in California. That is my honest opinion.

Mr. Henson: Well, I am just trying to point out to your Honor that we are going into this case, and the most important aspect of the thing, and all we were ever interested in in this case—I knew we didn't have any chance to win this case on the guilty or not guilty or even on the insanity thing, and so the only thing that we were interested in was the penalty. And it comes up now at a time when the death penalty has been discussed pro and con. People have written letters to the editor. There have been so many comments on the results in the Elizabeth Duncan case, and not [fol. 124] so much on the Baldonado case, but some comment upon that, and we are going into the face of all of that and I am discouraged about what the reception is going to be.

The Court: Well, you would probably be discouraged on what the reception might be in any County in this case. You are going to have the same evidence no matter where you try it.

Mr. Henson: Right, but you are not going to have the same people hearing it who have heard it time after time, who know the people involved, who know the individuals, know the public officials, know the people on the other juries, have been in the courtroom, have seen the lines in the courtroom, know people who have attended the trial. I just leave it to your Honor's discretion. As I say, the time is drawing nigh and I wish you would consider it and might want to take it under submission.

The Court: Well, as far as these newspapers you have, I take all the Ventura County papers, Ventura Free Press, Oxnard Courier, Fillmore Herald, all the papers that amount to anything in Ventura County. I take them, anyway, and I take the News-Press, Santa Barbara News-Press, and read it. I have read all these papers. I have read these articles, especially those articles. I took interest in reading those articles. I know what they are in advance. Those same articles were published all over California and all over the United States, and to some extent all over the world. I don't think you will find any [fol. 125] difference, as far as this case is concerned, certainly not any place in California. In fact, in some places I can conceive that you would be at a greater disadvantage. If we still had to consider the question of guilt or inno-

cence, there might be more weight to your argument. That is behind us.

Of course, I have considered this matter twice before.

Mr. Henson: I know you did.

The Court: I have read those articles.

Mr. Henson: That's right, and I want to take up——

The Court: And looked them over the second time.

Mr. Henson: As I say, I don't want to take up——

The Court: It doesn't make any difference what they are under the law of the State of California.

Mr. Henson: Like I started to say, I don't want to take up your Honor's time too much.

The Court: Well, this is an important matter. I am willing that you should take all the time you want to.

Mr. Henson: Well, like I say, we went over this before at length and I just presented to your Honor again, and if you feel you will change your mind on a thing, why, there is still time to do so between now and Monday.

The Court: No, if I had the slightest notion in the world that he couldn't get a fair trial right here in Ventura County, I would grant your motion, but I have absolute [fol. 126] confidence in the people of Ventura County. I think that you can get a fair jury, a jury that will be absolutely fair and impartial and decide the case according to the evidence, and that's all you can expect any place.

ORAL RULING DENYING MOTION FOR CHANGE OF VENUE

COLLOQUY ON PLEA

Mr. Deem: If you Honor please, there is one thing in counsel's declaration which I should like to call to the attention of the Court because I think it is a matter that is extremely serious. That is the matter which appears on Page 2 of counsel's declaration starting with Line 22.

The Court: Page 2?

Mr. Deem: Page 2 starting with Line 22 wherein counsel says; "In view of the early trial date of the above-named co-defendants, the lack of time to adequately prepare for the case, and in view of the bias and prejudice which I believe existed and in view of the evidence I advised defendant Moya to withdraw his plea of not guilty."

Now, if counsel advised Moya to withdraw his plea of not guilty because of lack of time to adequately prepare for the case, his client was not properly advised. A man should not be put in jeopardy of his life merely because an attorney believes that he doesn't have adequate time to prepare for the case.

If counsel likewise advised his client to plead guilty in view of the bias and prejudice which existed, the client was ill advised.

[fol. 127] In so serious a case, in any case, but certainly in so serious a case as this the only reason for advising a man to withdraw his plea of not guilty, where he has also pleaded not guilty by reason of insanity, would be because his counsel believes him guilty, and if his counsel does not believe him guilty, he had no business advising him to withdraw that plea.

And with this declaration in the record, if the case went up on appeal and Moya got new counsel and he could point out to the Supreme Court that his counsel in this case had pleaded him guilty because he didn't have time to prepare for the case or because he thought there was bias and prejudice in the County, I think we would be in grave danger of a reversal.

I think counsel should be put on record that those statements are not true and that he did not have Moya plead guilty because he felt that the time was short or because he felt that there was bias and prejudice, but that he advised him to plead guilty because he believed he was guilty.

I have one other matter on Page 4. Mr. Henson on Line 8 inaccurately says, "And when defendant Moya has pleaded guilty, while the withdrawal of the plea of not guilty has the same practical effect." There is on the record no plea of guilty and that should be noted, otherwise the declaration would be confusing.

Mr. Henson: Well, in answer to that, if the——

The Court: What?

[fol. 128] Mr. Henson: In answer to that, if Mr. Deem here feels that this defendant has not been adequately represented in this case, I will be glad to withdraw from it.

Mr. Deem: Now, if your Honor please, I made no such statement.

Mr. Henson: Yes, you did.

The Court: I don't think there was any implication to the effect that the defendant has not been adequately represented.

Mr. Henson: Well, I made the representation that the only reason we withdrew the plea of guilty was because we didn't have adequate time to prepare. I think if you will look at Line 25 there, I say very clearly, "and in view of the evidence." Did you read that, Mr. Deem?

Mr. Deem: Yes, I read that, but certainly counsel should not consider his time or bias or prejudice as conditions upon which he should plead the man guilty. The only reason he should plead him guilty is that the evidence indicates his guilt. And I did not say that Mr. Henson pleaded him guilty because he had a lack of time. I merely pointed out that Mr. Henson said it.

The Court: I understand.

Well, in the first place, I had to appoint an attorney to defend Mr. Moya. I departed from the ordinary custom of appointing the attorney that happened to be next in line. I appointed Mr. Henson because I knew he had much [fol. 129] experience in criminal matters. He was a long time a very able and efficient District Attorney of Ventura County, to my personal knowledge. I appointed him because I believed in his ability, and I knew that it was a serious case and I thought that the defendant was entitled to be represented by an able and experienced lawyer, and that is the reason I appointed Mr. Henson. And I still believe that he is an able and I know he is an experienced attorney. I am satisfied that his client was properly represented all along the line and I am also satisfied that Mr. Henson wouldn't advise any defendant to plead guilty unless he believed he was guilty.

Mr. Henson, I think we are entitled to a statement here as to why you advised your client to plead guilty, if you advised him to plead guilty. He could have pleaded guilty without your advice.

Mr. Henson: Well——

The Court: I think I have a right to assume that if you advised him to plead guilty, that you believed he was guilty or you never would have advised him to plead guilty.

Mr. Henson: Your Honor, I believe he was guilty of this crime from the time that I first talked to him and he told

me about the case and he stated that was the truth, and the truth was that he had committed this.

The Court: Well, that is the reason he pleaded guilty, isn't it?

Mr. Henson: That is correct.

[fol. 130] Not because you advised him to plead guilty because you didn't have time to give him any other advice.

Mr. Henson: Well, no, your Honor. It is this, that a defendant in most cases doesn't know what the law is or anything else.

The Court: He doesn't know what the law is, but he knows what the facts are. He knew he was guilty and he wanted to plead guilty and he had a very capable attorney, in my opinion, and you both talked it over and decided that he should plead guilty; isn't that the truth?

Mr. Henson: That is the truth, and if Mr. Deem will be satisfied, we will have the defendant come up right now and he will withdraw his plea of not guilty by reason of insanity and he will enter a plea of guilty to it.

Mr. Deem: If your Honor please, it is not a question of satisfying Mr. Deem. I merely call the Court's attention to the statement in the declaration. I think what has transpired in this court has adequately explained the matter.

Mr. Henson: Mr. Moya, when you withdrew your plea of not guilty to this crime, you understood that that was pleading guilty to murder in the first degree; is that right?

Defendant Moya: That is correct, sir.

Mr. Henson: And that was because that was the truth; is that right?

Defendant Moya: That is correct. Also, that was my [fol. 131] main purpose of doing this or taking the action that I did was because I, myself, believed that it would be best. I knew I was guilty. I had confessed to it already and I confessed to my attorney when we first talked about the matter and he felt that I was guilty also, so he advised me on those grounds to come out and change my plea of not guilty to guilty, and if he will advise me to change my plea of not guilty by reason of insanity, I shall do it also.

The Court: Well, you pleaded guilty because you were guilty; isn't that a fact?

Defendant Moya: Yes, sir, it is.

The Court: I don't know what else you could have in this record.

Mr. Deem: I think the record is complete, your Honor.

The Court: All right.

Mr. Deem: There is only one thing. We have used the term "pleaded guilty" when what actually transpired was that the defendant withdrew his plea of not guilty and left his plea of not guilty by reason of insanity standing, which in legal effect is the same.

Mr. Henson: Just quibbling about legal technicalities.

The Court: How about the plea of not guilty by reason of insanity? If he pleads guilty, the insanity plea falls, doesn't it?

Mr. Henson: Well, that is correct.

The Court: I understand that you withdraw the plea [fol. 132] entirely, don't you?

Mr. Henson: All right, let me ask you this—yes, I will ask the defendant here in open court.

Luis, do you feel that at the time that this offense was committed that you were able to distinguish between right and wrong?

Defendant Moya: Well, I personally myself don't think that any person who would do any horrible thing as what I did would be in a right state of mind. For that matter, I believe that anybody who commits any kind of crime wouldn't be in the right kind of mind. That is my personal opinion. But I believe that the psychologists—rather, psychiatrists and I myself think that I knew what was right from wrong at the time also to a certain extent.

Mr. Henson: And you also knew the nature and quality of the act; is that right?

Defendant Moya: That is correct, sir.

Mr. Henson: All right. Then we will withdraw the plea of not guilty by reason of insanity and plead guilty.

The Court: The only thing left to be determined is the penalty.

Mr. Henson: That is correct.

Mr. Deem: Mr. Moya, is it your wish to withdraw your plea of not guilty by reason of insanity; is that correct?

Defendant Moya: Yes, I do. I do withdraw my plea.

The Court: All right.

Mr. Deem: And you do plead guilty to the crime that [fol. 133] is charged against you?

Defendant Moya: Yes, I plead guilty to murder in the first degree.

The Court: Well, it is there several times now. That ought to be sufficient.

Mr. Henson: I hope so.

Mr. Deem: Yes, your Honor.

The Court: The matter is on for trial next Monday, isn't it?

Mr. Henson: That is correct, your Honor.

The Court: So far as time is concerned, Mr. Henson, it appeals to me that you had a good deal of time to consider this case and you have considered it pretty carefully, I think.

Mr. Henson: Well, I have.

The Court: Yes.

Mr. Henson: I am not quarreling about the time now.

The Court: All right.

[fol. 134] Ventura, California, May 7, 1959. 9:55 o'clock A.M.

DEFENDANT'S MOTION FOR NEW TRIAL AND ARGUMENT THEREON

The Court: All right, People versus Moya.

Mr. Henson: Yes, your Honor. At this time the defendant will move the Court for a new trial under the provisions of Section 1181, Subdivision 5, and Section 1181, Subdivision 7, of the Penal Code.

In accordance with the provisions of Section 1181.5, the defendant contends that the Court erred in a number of questions of law arising during the course of the trial. And I want to preface my remarks with this, your Honor, that this is no reflection upon your competency, honesty or anything like that. This is a new field, an unexplored field of law.

The Court: Well, I am used to motions for a new trial. That is your constitutional right.

Mr. Henson: Well, I want to make that clear. There are a number of errors that the defendant feels resulted in a miscarriage of justice in accordance with the definition

thereof of Artfcle 6, Seçtion 4½, of the California Constitution. I will enumerate them:

One, the Court permitted a tape-recording confession of the defendant to be played to the jury without any preliminary proof that the confession was free and voluntary.

Two, the Court refused defense counsel the right to voir dire examination of the prosecution witness, Raymond [fol. 135] Higgins, to determine whether or not this tape-recording confession of the defendant was free and voluntary.

Three, in connection with the introduction of this tape-recording confession and in response to an objection by defense counsel, the Court said, "Well, he says right in the statement itself that it is free and voluntary." I think that this statement infers that the tape-recorded confession proved itself by matters which were recited in the tape-recording confession, without any preliminary proof, independent proof of the circumstances under which the tape-recorded confession was taken.

No. 4, and referring to Plaintiff's Exhibits M-5, M-6 and M-7, the Court permitted photographs of the body of the victim to be admitted into evidence, when such photographs constituted only cumulative evidence and were gruesome and were apparently offered by the District Attorney for the obvious purpose of inflaming and prejudicing the jury. This was after there had been the confession already introduced by the defendant, plus the reading of the defendant's testimony in trial, and constituted no value as evidence to the jury.

Referring to No. 5, the Court admitted into evidence a gun, which was Plaintiff's Exhibit M-9. The gun was admitted without proper foundation that the gun was in the same or similar condition as another gun allegedly used by the defendant in the perpetration of the offense.

No. 6, the Court refused to permit defense counsel to [fol. 136] show a documentary moving picture to the jury of how the death penalty is administered in California, as an illustration of defense counsel's opening statement.

No. 7, the Court permitted the District Attorney to cross-examine a doctor, Lamont Smith, a defense witness, concerning the fact that 10 times more persons escaped from State correctional facilities than were executed, which went

beyond the scope of any direct examination and called for testimony which was incompetent, irrelevant and immaterial and very prejudicial.

No. 8, the Court permitted the District Attorney to cross-examine Dr. A. Lamont Smith concerning the fact that within the third year after parole almost 50 per cent of parolees had their parole suspended for violations, which was far beyond the scope of direct examination and called for testimony which was incompetent, irrelevant, immaterial and very prejudicial.

No. 9, the Court permitted the District Attorney to further cross-examine Dr. A. Lamont Smith as to a specific Audult Authority case file of the defendant, which was beyond the scope of direct examination and which called for evidence which was incompetent, irrelevant and immaterial of that time.

No. 10, the Court permitted the District Attorney to cross-examine Dr. A. Lamont Smith concerning the fact that a man committed for murder to a State correctional facility had killed another inmate, which was beyond the scope of [fol. 137] direct examination and which called for testimony which was incompetent, irrelevant, immaterial and prejudicial.

No. 11, the Court permitted the District Attorney to cross-examine Joseph Spangler on the criterion for release of any prisoner from a State correctional facility, which again was beyond the scope of direct examination and called for testimony which was incompetent, irrelevant, immaterial and prejudicial.

No. 12, the Court permitted the District Attorney to continue to cross-examine Joseph Spangler after the District Attorney cross-examined and redirect examination was completed, which was prejudicial to the defendant.

No. 13, the Court refused to permit Pete Gonzales to testify concerning the nature and character of the City of San Angelo, Texas, where the defendant was born and raised.

No. 14, the Court refused to permit Agnus Moya to testify to certain matters relevant to the character, background and history of the defendant.

No. 15, the Court refused to admit into evidence a tape recording of a conversation between the defendant and

Frank Kerr, which was circumstantial evidence of the state of mind of the defendant.

And No. 16, the Court refused to permit Phillip W. Thatcher, an expert in the field of education, rehabilitation and juvenile delinquency, to express an opinion as to whether or not the defendant was a good risk for rehabilitation.

[fol. 138] No. 17, the Court refused to permit Manuel Ontiveros to testify concerning conversations with the defendant wherein the defendant stated his religious belief, which evidence was relevant and material to the issue of penalty.

No. 18, the Court refused to admit into evidence a tape-recorded conversation between the defendant and Manuel Ontiveros concerning the religious belief of the defendant, which was relevant and material.

No. 19, the Court refused to admit into evidence a tape-recorded conversation between the defendant and Hope Rios, concerning defendant's religious beliefs, which was relevant and material to the issue of penalty.

No. 20, the Court refused to admit into evidence the tape-recorded conversation between the defendant and Floyd K. Gressett, concerning defendant's religious beliefs.

No. 21, the Court permitted the District Attorney to cross-examine Dr. David R. M Harvey concerning the psychiatric examinations of co-defendants Elizabeth Duncan and Augustine Baldonado, which called for evidence which was incompetent, irrelevant, immaterial and prejudicial to defendant.

No. 22, the Court erred in refusing to permit the defendant to testify as to statements made by him concerning his religious beliefs, which would have constituted circumstantial evidence of his state of mind after the crime.

No. 23, the Court refused to permit defense counsel to [fol. 139] open and close the argument, when there was no burden of proof and when the defense had produced the overwhelming quantity of the evidence.

Now, defense counsel does not have available a complete transcript of the trial, only a partial transcript. Furthermore, I did not have the time necessary to review all possible errors of law and I did not have the time to review comments of the District Attorney during the course of the trial to determine whether or not they may have con-

stituted prejudicial misconduct. So I don't mean to be waiving anything else by stating these errors.

I feel that these errors in themselves, the cumulative effect or even individually, are enough to grant a new trial in view of Article 6, Section 4½ of the Constitution.

The defendant also contends that the verdict of death is contrary to the law and the evidence, under the circumstances surrounding this particular case, and the defendant requests that the Court exercise its power under the provisions of Section 1181, Subdivision 7, and modify this verdict of death by imposing the punishment of life imprisonment.

I know it may seem farfetched to say that this was contrary to the law but if you will follow me a little bit, I think I can demonstrate that.

Under the provisions of Section 190.1 of the Penal Code, the jury is vested with discretion to impose either life imprisonment or death in a first degree murder case, and the [fol. 140] cases interpreting this section have stated that this discretion is absolute. The defendant contends that the jury in this particular case was rendered incapable in a practical way of exercising any absolute discretion.

You will recall on the voir dire examination practically every juror stated that he or she had some opinion of, based upon public media of communication, concerning the Duncan murder case and what penalty should be imposed upon the defendants, and in view of the publicity surrounding the Duncan murder case, which was adverse to the defendants, in view of public statements made by the District Attorney, and in view of the press releases by law enforcement officers connected with the investigation of the case, the opinion of these jurors could only be adverse to this defendant, and even though the jurors stated that they could, notwithstanding such opinions, fairly and impartially try the case, the defendant and myself, I feel, it is our position, that this is practically impossible, that after an opinion such as the opinion they must have had, after all the publicity, it is practically impossible for a person to perform this mental feat of judging a case fairly and impartially in the face of all the publicity and conversation concerning the case.

So in that way I feel that the jurors' absolute discretion was curtailed. I say it is in a practical way.

Another thing that curtailed the absolute discretion of the jurors in a practical way is that, we recall, on voir dire [fol. 141] examination each and every juror stated that he or she knew that the co-defendants, Elizabeth Duncan and Augustine Baldonado, had been sentenced to death in separate trials held immediately prior to the commencement of the penalty trial of Luis Moya, and even though they were instructed otherwise, the jurors' discretion was curtailed and restricted in a practical sense in this case by previous judgments of death in the co-defendants' cases. And it was argued by the District Attorney that, in substance, it would be ridiculous to impose a penalty on this defendant different from the other co-defendants, and it would have been futile for defense counsel to object to that line of argument, because every juror knew what punishment had been imposed upon the co-defendants, and because the Court had permitted the District Attorney to cross-examine Dr. Harvey concerning his psychiatric examinations of the co-defendants, so in another practical way the absolute discretion of the jury was curtailed.

In another way it was curtailed in the practical sense. We take Section 1074 of the Penal Code to provide that a juror may be challenged for implied bias in a case where the offense charged be punishable by death, when such juror contains a conscientious objection to the infliction of the death penalty. Now, in recent months this question of capital punishment has become a topic of public interest, has become a matter for public debate. It has become a topic for television commentary, a subject for legislative [fol. 142] policy considerations and private discussions, too, and the result of this public debate and public discussion concerning the death penalty, I feel, has resulted in that very few people are neutral on the subject now, and those people who under ordinary circumstances, had there not been the discussion about the capital punishment, would have been neutral on the subject, but when you have a subject with such emotional charge in it publicly discussed, I feel that people tend to either be for it or against it, and that those people who, prior to the public debate in the Legislature and the widespread publicity given to that topic, have now become either affirmatively for the death penalty or perhaps against it.

Now, the way the law is, everybody who is against it is challenged for implied bias, so the only people that you get on the jury are those that have no conscientious scruples, and I say if you don't have any conscientious scruples against the death penalty, in view of the publicity given the topic, that you are affirmatively for the death penalty. The result is that jurors selected in capital cases are affirmatively for the death penalty and follow the arguments——

The Court: You mean they are affirmatively for the death penalty in every case?

Mr. Henson: Not in every case, your Honor, but I say that because of the public discussion and the emotionalism back and forth, that people have tended to go either one [fol. 143] way or the other and are more inclined to go that way, so I think that this law is rather antiquated or, at least, it is not workable in our present society, Section 1074, and I think that that again curtails a juror's discretion as to whether or not to impose the death penalty.

Well, passing on to the next contention of the defendant, it is that the verdict of death is also contrary to the facts as they relate to this defendant. Now, I am talking to you as a 13th juror, which sometimes the Court has been referred to in motions for a new trial, and I feel that it is the duty of the trial judge to review a case carefully when the trier of fact, as they were in this case, the jury, was forced to judge this case in an atmosphere of public passion, and I feel that when a verdict has been materially influenced by public feeling, it is the duty of the trial judge to rise above this public opinion and public feeling and judge the case from an objective viewpoint. I think the Judge, yourself, in this case should use your power, the just power that you have, in a motion for a new trial, to bring about a just result. And the law doesn't require that the trial judge follow blindly this retribution theory of a life for a life, and the law doesn't require the Judge to look to the circumstances of the crime itself only. We do not deny that a view of the circumstances of this crime itself would lead many people to consider them aggravated, but I don't think we can shut our eyes and I don't think [fol. 144] that the law requires the Judge to shut his eyes to the underlying causes which brought about the circumstances of this offense. I think the Judge should take into

consideration the sociological and psychological makeup of this defendant, in the imposition of this punishment. You have heard and seen enough evidence about his sociological and psychological makeup. If we only look to the circumstances of the crime itself, I think that we would be very shortsighted and you, with many years of experience in many cases, I am sure can see through——

The Court: Well, if you look at the circumstances of this crime alone, where do you get?

Mr. Henson: You don't get anywhere, Judge.

The Court: Think of the circumstances of this crime.

Mr. Henson: I have thought about them so many times. I have though of the circumstances of a lot of crime.

The Court: Yes, but this crime stands out in bold relief.

Mr. Henson: Does that mean that we are going to shut our eyes to the circumstances of the underlying causes of the thing? Look at the Loeb and Leopold case. That was far more terrible than this, and there the judge looked at the sociological and psychological backgrounds of the defendants. I don't care how terrible the crime is. I don't think that that is any basis for imposing punishment alone. It is certainly one factor but we can't be blind to the underlying causes of it.

[fol. 145] Now, I know your Honor has had this case literally running out your ears for the last four months and I know that you know everything that there is to know about this case that has been presented in this court. The law certainly doesn't require that joint defendants be punished equally, and each and every day in the courts of this State defendants charged jointly with criminal offenses are given individual consideration and frequently receive different punishment. Let's look at the three defendants in this case and see if they should be punished equally or whether there is a lot of room for different consideration in view of their own individual selves.

Take Elizabeth Duncan, who in the face of overwhelming contrary evidence denied any implication in the murder. This was an apparent, deliberate and flagrant perjury. In addition to that she maintained an arrogant attitude toward the Court and the Court's officers, and other than the questionable testimony from her son, there was no evidence whatsoever that she had ever made any kind of contribution at all towards society. In fact, her son, as I

recall, was the only witness she produced. Nobody could say anything good about her. And, furthermore, her age and lifelong pattern of antisocial conduct left little, if anything, to be hoped for by way of rehabilitation. No remorse, not even accepting any responsibility whatsoever.

Take the co-defendant Baldonado, aged 25, also a pattern of lifelong antisocial conduct. But you recall how he [fol. 146] cooperated with the law enforcement agencies, when he was called to testify in the Elizabeth Duncan case. About all he had was a lapse of memory. Furthermore, he was a Heroin user, probably physically addicted. He produced no evidence to show any basic change in attitude after the offense. He didn't even testify in his own behalf at his own trial, produced no evidence showing any remorse about his part in the offense, and he produced no evidence showing any periods in his life when he made any positive efforts toward reformation.

This defendant certainly falls in a different category from the other two defendants. I don't think there is any comparison between the three of them. Here is a man only 20 years old. Granted, if you want to call the facts of this case aggravated. Go ahead and do it, but then let's look at these things, too. And since his confession he has made no atempt to minimize or excuse his part in the offense. He stood up here and told the truth and said, "This is what happened and I will take whatever you want to dish out to me. I'm not trying to dodge this thing. I'm not trying to lie about it. I'm not trying to make any excuses, rationalizations or anything." He cooperated in every way possible with law enforcement agencies, after he did confess. He testified as frankly and truthfully as any witness I have ever seen in the Elizabeth Duncan case. He pleaded guilty, made no attempt to deny his part in the offense in this case. He testified frankly [fol. 147] and truthfully in his own trial. Even the District Attorney said he had no quarrel with the man's sincerity, and I certainly have none, either. He has certainly shown true remorse for his part in the offense and he certainly has made positive efforts to remold his basic attitudes since his confession to the crime. He has contributed to the overall public good by his attitude toward religion and the practice thereof. He has become somewhat of an inspiration to missionaries who are working

in the jails here, and he is one example of the person who has attempted whole heartedly to change. And even though he had a long pattern of antisocial conduct, too, I think that the defense certainly presented ample evidence to show psychological and sociological causes for that, produced witnesses who testified that in various times of his life he did have changes of heart and tried to do what was right, but he didn't have enough of the psychological, sociological background to persist in that, even though in his own heart he tried.

And compared to the other defendants, his salvage value, if we can talk about salvage value in human values, and I think we can, his salvage value is great and his chances of rehabilitation are incomparable with the other two defendants. And with the attitude he has now, he could be a valuable asset to society, even if he were only confined in an institution for the rest of his life, by practicing religion, by leading the good life within the institution, and having an effect upon the fellow prisoners.

[fol. 148] And in closing, I want to say this, that if law is administered without any consideration of human purposes, then it is really no law at all, and if the law isn't administered without regard for human value and purpose, it is really a monster. I have looked for kindness and consideration in this case for four months and I'm asking this Court to have consideration for this young man and modify this verdict so that it will have some human value. Retribution, a killing, I say accomplishes no human purpose whatsoever. I feel retribution just by itself is a barbaric type of thing and an historical thing that we are still faced with, that is still with us, when the idea was that a man was bad, so kill him and that solves the problem. A life sentence will accomplish something of human value and I ask that you modify this sentence of death and impose life imprisonment instead.

The Court: Well, what do you have to say, if anything, Mr. District Attorney?

Mr. Gustafson: Well, your Honor, with respect to the points of alleged error in the trial, I think all those were fully covered, each and every one of them, at the time of the trial, and all that Mr. Henson has done is list them now. He hasn't argued any legal reasons or cases or any-

thing as to why a particular ruling was error. He simply is listing 15 or so rulings and alleging them to be error. We have argued them all out before, at the time of the trial. I don't believe that any one of the rulings was [fol. 149] error, let alone all of them, and that there is nothing more to add on that because there has been nothing said by Mr. Henson to demonstrate the validity of his point with respect to error.

With respect to reducing the punishment from death, fixed by the verdict, to life imprisonment, I would point out that while a judge in Chicago many, many years ago did fix the life imprisonment sentence for two men by the name of Loeb and Leopold in a slaying, the situation in that case was quite different on the facts and certainly the situation was completely different on the law, inasmuch as in that instance the trial of the penalty was before the judge himself, not before a jury. This defendant chose to have a jury fix his penalty. Now, in that respect, really the thing for the Court to determine is whether the Court disagrees entirely with the conclusion of the jury and thinks that the Court should substitute its own views, if those are different views, from that of the jury, and I would say that in this instance I don't see anything that would compel a judge, in the light of the history of the case, to set aside completely the opinions of 12 impartial citizens, who decided in their absolute discretion that the death penalty would be appropriate. Consequently, I feel that the motion for a new trial should be denied.

The Court: In the view that I take of it, this case has resolved itself into something different from a legal question. It really in a true sense, properly analyzed, ceases to be a legal question.

[fol. 150] Just as the District Attorney has said, if the case had been tried before me in the first place and I had to determine the penalty, I might do something different from what I would do in this case. I don't know that I would, but it is entirely possible that I would.

I remember the Loeb-Leopold case very well. I followed Clarence Darrow's argument very closely at the time when he made it. He was talking then to a judge, one person. But I would have to practically ignore the opinions of 12

jurors, if I should set aside their verdict and render one of my own.

Mr. Henson: I don't see that, your Honor. Your position as judge really is that of a 13th juror. Every day in civil cases certainly it is done very frequently.

The Court: Well, even though I am a 13th juror, you would expect one juror to swing 13, would you—overrule 12, I mean?

Mr. Henson: Well, with a juror of your stature, I would say, "Yes." And you told me one time yourself that you had a case where you were prosecuting and you just kept one juror in the panel there, knowing that he was all you needed to win the case and, sure enough, that is what happened. All you did was convince one juror, but he convinced all the rest of them.

The Court: Well, that is all you need to do. If you convince one juror in a criminal case, you have got them, haven't you?

[fol. 151] Mr. Henson: Well, that is right, but——

The court: I had forgotten about it, but I did tell you once that I tried a case in Oxnard when I was City Attorney, and W. E. Shepard, a very well known, very able, lawyer in a criminal case was defending. Oxnard in those days was a pretty wide-open town, and it was difficult to get a jury that would be on the square. It was a lottery case. I knew that I had one member of the jury who played the lotteries, but I knew he was an honest man, and I just played on him all the time, referring to his honesty and that he was here as a citizen and not as a player at a lottery game. He knew that I knew that he played the lottery and I knew that he knew that I knew that he played the lottery. But I also knew that he was absolutely honest, and I convinced him. The first ballot was 11 to 1 for acquittal, and the last ballot was 12 for conviction. He convinced the other 11, as I thought he would do.

That doesn't really have anything to do with this case. This is a very serious matter, and if there is anybody that imagines that I haven't thought about the case night and day and at midnight and all of the times, why he is very badly mistaken. It is no simple thing to have to pronounce a death penalty upon any individual, regardless of what the facts and circumstances are. It is a very serious matter and it is a difficult thing to do. But if one is going to be a

judge, why he has to be a judge and he has to decide the [fol. 152] matter carefully and conscientiously and impartially and the way he really sees it.

As fas as this particular case is concerned, it is about the most revolting case—in fact, it is—that I have ever known anything about in this County. The facts and circumstances are just simply terrific. Of course, certain photographs shown to the jury were part of the case. The District Attorney had a right to show the jury what the facts and circumstances of the case are and just how revolting it was, what a terrible crime it was. In fact, I mentally criticized the District Attorney myself for being so lenient about introducing the photographs. He left the best photograph of all out, and he did it with the idea in mind that it might be construed to be inflaming the jury, but, regardless of that, it showed one of the salient facts in the case and, just as it happened, he didn't need to do it. His judgment was probably better than mine. It worked all right, anyway.

Of course, you were appointed by the Court, Mr. Henson, and you certainly were very able and very efficient in representing the defendant. I don't think any lawyer could have done any better than you did and I think you are entitled to great commendation.

But, of course, we don't think about the lawyers on either side. I am thinking about the case itself and I am trying to do exactly what I feel is my duty in the premises. Of course, I know that you know that it is no simple thing for [fol. 153] a judge to render an opinion or judgment in a case of this kind. I know that you know that. And if I hadn't known it before, I certainly know it now, because I have thought now for hours and hours about this case.

The thing that came nearest to swaying me was the youth of the defendant. You talked about Baldonado and Moya. Moya was obviously very much abler mentally than Baldonado. He is a much sharper man or young fellow, and he is even more responsible than Baldonado. I thought Baldonado wasn't too faraway from a moron. Moya is a pretty smart boy.

ORAL RULING DENYING MOTION FOR NEW TRIAL.

Well, anyway, the application or the motion for a new trial is denied. Will you please stand up, Mr. Moya.

You were indicted by the Grand Jury of Ventura County

on the 26th day of December, 1958, for the murder of Olga Duncan. You were duly arraigned, told what all your Constitutional rights were, and the very able attorney, Mr. Henson, was appointed to represent you, and he did represent you remarkably well and with great vigor. But in spite of his representations, a jury determined what your penalty should be.

In the first place, you plead not guilty and not guilty by reason of insanity, but you afterwards changed your plea, waived your plea of insanity, of not guilty by reason of insanity, and decided to go to trial purely on the question of penalty, and the case as to the penalty was tried to a jury, to say it in legal circumstances. "Tried by a jury" means the same thing. And the jury, after very careful considera- [fol. 154] tion apparently, decided to inflict the death penalty upon you.

And your motion, as I say, for a new trial has been denied and the Court has refused or, at least, now refuses to change the sentence from death to life imprisonment, that it apparently has a right to do under the provisions of Section 1181 of the Penal Code, because I do not feel like substituting my opinion for that of the jury. My observation was that the jury were a very conscientious aggregation of men and women and they apparently were at least of average intelligence, and I thought that they were above the average intelligence. In fact, I thought we had a remarkably good jury.

So this is the time for pronouncing judgment against you. Do you know of any legal excuse to offer why the judgment of the Court should not be pronounced against you according to law?

Mr. Henson: No legal excuse.

The Defendant: No.

JUDGMENT AND SENTENCE

The Court: It is the judgment of the Court that you be sentenced to death by the administration of a lethal gas at the State penitentiary at San Quentin, California, and the Sheriff of this County is directed to deliver you within the next 10 days to the Warden of that institution; that

is, to the Warden of the State Penitentiary at San Quentin. I will sign the proper commitment for the Sheriff.

Remanded to the Sheriff.

[fol. 155] Mr. Henson: Your Honor, the defendant has asked me to thank this Court, the County of Ventura, for courtesy and consideration that they have shown him.

The Court: All right.

[fol. a] IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF VENTURA

Honorable Charles F. Blackstock, Judge

No. CR-3220

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

LUIS ESTRADA MOYA, et al., Defendant

Reporters' Transcript

APPEARANCES OF COUNSEL:

For the People: Roy A. Gustafson, District Attorney.
For the Defendant: Burt Henson.

[fols. 1-26] Ventura, California, April 20, 1959 10:00 a.m.

COLLOQUY BETWEEN COURT AND COUNSEL

(The following proceedings were held in Chambers.)

The Court: Well, what do we have here?

Mr. Henson: Just a couple of matters we wanted to get straightened out in the absence of the jury, and one of them is on the motion for change of venue. When we first made it, back in January, you denied it, but with——

The Court: Without prejudice.

Mr. Henson: And then when we made it again Thursday, you just denied it period.

The Court: Well, it's denied again without prejudice. You can renew it after the voir dire.

Mr. Henson: All right. May it be stipulated that we need not give the 24 hour written notice before making the motion?

Mr. Gustafson: Actually, in fact, I don't think under the code the motion made after voir dire needs to be on any notice whatever.

Mr. Henson: All right, fine. One other thing, your Honor.

The Court: Then if it does need a notice, it is waived.

Mr. Gustafson: Yes, your Honor. I'm quite positive there is no notice needed, but it is waived in any event.

The Court: I don't think any is needed either.

[fol. 27] Mr. Gustafson: In fact, it is really a different notice than the other one.

The Court: But just out of abundance of caution, we will say that if there is such a notice, that notice is waived.

Mr. Henson: All right. Now, one other matter in the matter of voir dire examination, normally it is the practice that the Defense Counsel has to interrogate all of the jurors prior to the District Attorney's asking them questions. Now, because there are so many jurors, and because there are so many items to be covered in this case, and because of the serious nature of the case, I would like to move the Court to allow alternative questioning; that is, allow me to question a juror, then the District Attorney to question the same juror, or so that I can keep track of these many jurors. Now, this is a matter that is within your discre-

tion. I know you have done it before on cases where there are a large number of jurors and items difficult for Defense Counsel to keep track of what the jurors say.

The Court: What do you want to do about that?

Mr. Gustafson: I don't care.

The Court: It is all right?

Mr. Gustafson: If Mr. Henson feels it is easier for him to do it that way, I'm not going to raise any objection to it.

The Court: Is that all?

Mr. Henson: That is all.

[fol. 28] The Court: It will be stipulated, will it not, that the Court in the first instance may ask each juror whether or not he or she has any conscientious scruples about imposing the death penalty.

Mr. Henson: Yes, that is so stipulated, your Honor.

Mr. Gustafson: So stipulated, your Honor.

The Court: All right.

Mr. Gustafson: I have proposed instructions and proposed verdict forms which I now hand to the clerk and serve Counsel with a copy.

Mr. Henson: I have prepared instructions too, your Honor, but I don't have them available today. May I submit my instructions at a later time?

The Court: Yes, sure.

Mr. Henson: Any time before the argument, is that correct?

The Clerk: Well, you're supposed to instruct them before any evidence is taken. If you need a little time, I will waive that for awhile, but not so until we get, until the argument. I want to know what they are.

Mr. Henson: All right, I will have them in here tomorrow morning.

The Court: All right, fine.

Mr. Henson: Thank you.

The Court: That is all right.

(The following proceedings were had in open court.)

[fol. 29] The Court: The People versus Moya.

Mr. Henson: The defendant is ready, your Honor, and in court.

Mr. Gustafson: Ready for the People, your Honor.

The Court: All right. Call the jury.

The Clerk: Ladies and gentlemen, as I call your name, will you please answer by stating the number of miles that you traveled one way to the courthouse this morning. If you live in Ventura, please just answer by stating Ventura, and if you need letters for your employers about your jury duty here, speak up at the time I call your name and let me know, and we will mail cards out for you.

(Roll call of the jury.)

As I call your name, please step forward and the Bailiff will seat you in the jury box.

Henry D. Sonderup, S-o-n-d-e-r-u-p.

Harvey G. Nelson, N-e-l-s-o-n.

Mrs. Dorothy B. Germann, G-e-r-m-a-n-n.

Sally Irene Varela, V-a-r-e-l-a; is it Miss or Mrs.?

Prospective Juror: Mrs.

The Clerk: Theodore C. Wichman, W-i-c-h-m-a-n.

Margaret Norris, N-o-r-r-i-s. Is that Mrs. Norris?

The Prospective Juror: Yes.

The Clerk: Shirley Ruth Barrett, B-a-r-r-e-t-t. Barrett?

Prospective Juror: Yes.

[fol. 30] The Clerk: Dennis V. Robinson, R-o-b-i-n-s-o-n.

Mrs. Beulah M. Robertson, R-o-b-e-r-t-s-o-n.

Eugene C. Kountz—how do you say that?

Prospective Juror: Either way, Kountz or Koontz.

The Clerk: K-o-u-n-t-z.

Thorndyke T-h-o-r-n-d-y-k-e Roe, R-o-e, Jr.

Philip E. Holmes, H-o-l-m-e-s.

Will you all stand and raise your right hands, please, and be sworn as prospective jurors.

(The entire prospective jury panel was sworn.)

The Clerk: You may all be seated, please.

The Court: Ladies and gentlemen of the prospective jury, this is the case of The People of the State of California versus Luis Estrada Moya.

The defendant has been indicted by the Grand Jury of Ventura County and charged with the crime of murdering one Olga Duncan. Now, if any of you have conscientious scruples against the imposition of the death penalty in a

murder case, you're disqualified, so I'm going to ask each one of you to start with.

Juror No. One, that is in the back row there, Sonderup is it?

Prospective Juror: Yes.

The Court: Mr. Sonderup, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: Mr. Nelson, do you have any conscientious [fol. 31] scruples against imposing the death penalty in a murder case?

Prospective Juror: I do.

The Court: You have?

Prospective Juror: I do.

Mr. Gustafson: Challenge for cause.

The Court: You're excused; call another name.

The Clerk: Marian, M-a-r-i-a-n E. Thompson, T-h-o-m-p-s-o-n. Is that Mrs. Thompson?

Prospective Juror: Yes.

(Prospective juror was sworn by the clerk.)

The Court: What is her name?

The Clerk: Mrs. Thompson.

The Court: Mrs. Thompson, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, sir, I do not.

The Court: You do not, is that right?

Prospective Juror: That is right.

The Court: Mrs. Germann, is it?

Prospective Juror: Germann.

The Court: Mrs. Germann, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: Mrs. Varela, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: Mr. Wichman, is it?

[fol. 32] Prospective Juror: Yes.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: Is it Mrs. Norris?

Prospective Juror: (Nods head to the affirmative.)

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: Yes, I do.

The Court: You have?

Prospective Juror: Yes.

The Court: You're excused. Do you challenge this juror?

Mr. Gustafson: Challenge for cause, your Honor.

The Court: Call another name.

The Clerk: Beatrice Giroux, G-i-r-o-u-x.

The Court: Mrs. is it?

The Clerk: Is that Mrs. Giroux?

Prospective Juror: Yes.

(Prospective juror was sworn by the clerk.)

Please be seated Mrs. Giroux.

The Court: Mrs. Giroux, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: Yes, I do.

The Court: What?

Prospective Juror: Yes, I do.

[fol. 33] Mr. Gustafson: Challenge for cause.

The Court: It is understood that all of these people are challenged if they have conscientious scruples?

Mr. Henson: Yes, that is understood, your Honor.

The Court: All right, call another name.

The Clerk: Edna Louise Conley, C-o-n-l-e-y. Is that Mrs. Conley?

Prospective Juror: Yes.

(Prospective juror was sworn by the Clerk.)

The Court: Mrs. Conley, do you have any conscientious scruples—

Prospective Juror: No.

The Court—against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: All right, have that chair there.

Mrs. Barrett, is it?

Prospective Juror: Yes.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: Yes, I do.

The Court: What?

Prospective Juror: Yes, I do.

Mr. Gustafson: Challenge for cause, your Honor.

The Court: All right, you're excused. Call another name.

[fol. 34] The Clerk: Margaret S. Edmonson, E-d-m-o-n-s-o-n. Is that Mrs.?

Prospective Juror: Yes.

The Clerk: You said that was Mrs. Edmonson?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Clerk: Be seated, Mrs. Edmonson.

The Court: Mrs. Edmonson, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: All right, have that seat.

Mr. Robinson, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, I don't.

The Court: What?

Prospective Juror: No, I don't.

The Court: You say no?

Prospective Juror: No.

The Court: No, all right.

The Clerk: Your Honor, excuse me just a minute. This accidentally fell out of the box. I just want it clear to the record.

The Court: Is it stipulated that may be put back in the box?

Mr. Henson: Yes, your Honor.

[fol. 35] Mr. Gustafson: Yes, your Honor.

The Court: Mrs. Robertson, is it?

Prospective Juror: Yes.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do not.

The Court: Mr. Juror No. Ten, what's your name?

Prospective Juror: Kountz.

The Court: Kountz. Do you have any conscientious scruples against imposing the death penalty—

Prospective Juror: Yes, I do.

The Court: —in a murder case?

Prospective Juror: Yes.

Mr. Gustafson: Challenge for cause.

The Court: You're excused. Call another name.

The Clerk: Michael J. Casey, C-a-s-e-y.

(Prospective juror sworn by the Clerk.)

Be seated, Mr. Casey.

The Court: Mr. Casey, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: What?

Prospective Juror: No, sir.

The Court: All right.

Mr. Roy, is it?

Prospective Juror: Roe.

[fol. 36] Prospective Juror: Roe.

The Court: Roe, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: Mr. Helms is it?

Prospective Juror: Holmes.

The Court: Holmes. Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: All right. You may inquire.

Mr. Henson: First of all, I would like to just make a few remarks to the jury that the Counsel have the right to question you as to your qualifications, and when we ask you these questions, it's not to pry into your personal life or make it embarrassing for you or anything like that, merely to ascertain as far as we are concerned, whether or not we think you should serve on this jury. And, if any people are excused, please don't feel that we dislike you personally or anything like that.

Voir dire examination.

Mr. Henson:

Q. Mr. Sonderup, I think you said you lived in Meiners Oak, is that right?

A. Yes.

Q. What is your occupation?

A. I work for the Pacific Telephone.

Q. And in particularly, what do you do for Pacific Telephone?

[fol. 37] A. Lineman.

Q. Lineman?

A. Yes.

Q. Are you married, sir?

A. Yes, sir.

Q. Do you have children?

A. No.

Q. Are you personally acquainted with the District Attorney, Mr. Gustafson?

A. No.

Q. Are you personally acquainted with anyone in his office?

A. No.

Q. Are you personally acquainted with any law enforcement officer?

A. No. I know the man next door.

Q. You know Sheriff Suiter?

A. Yes.

Q. Is that just a casual speaking acquaintance?

A. Right.

Q. Did he ever discuss with you this particular case?

A. No.

Q. Anyone in your family that has served as a police officer any where?

A. No.

Q. Of course, you realize by this time, that this case here [fol. 38] today is one phase of the Olga Duncan murder case, do you not?

A. Yes.

Q. And do you understand that the sole purpose of this trial here is to establish the penalty for this defendant Luis Moya?

A. Yes.

Q. You understand that?

A. Yes.

Q. Do you understand that he has pleaded guilty and admitted the offense and so forth?

A. Yes.

Q. Mr. Sonderup, you indicated that you had no conscientious objection to the death penalty, but do you believe that the death penalty should be imposed in every first degree murder case?

A. No, not necessarily.

Q. Pardon me?

A. Not necessarily.

Q. Do you believe that the death penalty should be imposed in every case of first degree murder where it is willful, deliberate and premeditated?

A. I would say so, yes.

Q. You think that the death penalty should be imposed in every case of first degree murder that is willful, deliberate and premediated?

[fol. 39] A. I will say yes and no. There would be cause for it not to be and there would be cause for it, yes.

Q. Do I understand though that the mere fact that this defendant has pleaded guilty to a first degree murder case where he admits that it is willful, deliberate and premeditated, do you feel that just because it is willful, deliberate and premeditated that he should be given the death penalty?

A. I believe I would say yes.

Q. Regardless of what evidence were presented here in court, you still feel that in any case where it's willful, deliberate and premeditated, the death penalty should be imposed?

A. Unless the evidence shows no.

Q. You mean it's definitely established now that it is willful, deliberate and premeditated in this case?

Mr. Gustafson: Your Honor, I'm going to object to these questions on the ground that it's not fair to the juror to be asking him this type of question without at least first preliminarily telling the jurors that they do have a discretion in imposing the penalty, and that there is no rule requiring a particular penalty under particular circum-

stances. It is very unfair to these jurors to require them to answer these questions when they don't know what the law is.

The Court: The jury has the discretion either to impose the death penalty or life imprisonment, it's one or the other. You have the discretion. The evidence will be adduced and there might be evidence that would lead you to [fol. 40] one conclusion or evidence that would lead you to another. You can't tell; and with that question just put in that form it is not very fair.

Mr. Henson: I didn't mean to be unfair, your Honor, but I feel it is not my position to instruct the jury on the law. All right, I will rephrase that.

Prospective Juror: I will say no to your question then.

Mr. Henson: All right, then you would exercise your discretion, is that right?

Prospective Juror: Yes, I would.

Mr. Henson:

Q. And just because it is willful, deliberate and premeditated, you would not impose the death penalty for that one reason?

A. Not for that one reason, no.

Q. Mr. Sonderup, you have read about the Olga Duncan murder case in the newspapers?

A. Some, yes, sir.

Q. Have you heard the news broadcasts of it on the television?

A. No.

Q. Have you heard it discussed or did you hear commentaries on the case over the radio?

A. I don't have the time to do it.

Q. You don't have time to do it. Have you discussed this particular case of the death of Olga Duncan with any persons?

[fol. 41] A. With my wife, yes.

Q. With your wife?

A. Yes.

Q. Have you formed any opinions as to what punishment should be imposed upon the defendants in the murder of Olga Duncan?

A. Yes, but not death, because I don't know all of the details about it. No definite opinion has been formed.

Q. You have some opinion, is that correct?

A. To an extent, yes.

Q. Would you require some evidence to remove that opinion from your mind?

A. Well, yes.

Q. Would you keep that opinion with you throughout the trial?

A. No.

Q. You don't feel that that opinion would have some influence upon your thoughts throughout the trial? Will you speak up, please. Mrs. Bruner here is taking down all of this on the stenograph machine, so talk up a little bit. She has to take it all down.

Mr. Gustafson: He said he would listen to the evidence.

Mr. Henson: Excuse me, Mr. Sonderup, what did you say to the last question?

A. I would listen to the evidence here, said in court.

Q. All right, would you base your decisions totally upon [fol. 42] the evidence received here in court?

A. Yes.

Q. You have heard, have you not, that the other co-defendants in this case; namely, Elizabeth Duncan and Augustine Baldonado, received the death penalty?

A. I have, yes.

Q. The mere fact that those two co-defendants received the death penalty, would that have any influence upon your decision in this case whether or not to impose the death penalty upon Luis Moya?

A. No.

Q. You don't feel necessarily that all defendants should be treated equally in a criminal case in so far as punishment is concerned?

A. No.

Q. What newspaper do you subscribe to, sir?

A. The Ventura Star-Free Press.

Q. Do you recall when the case was first in the newspapers back in December, do you recall that?

A. I read about it.

Q. I beg your pardon?

A. I read about it.

Q. Did you read, in particular, a statement by the District Attorney that the perpetrators of this crime should be given the death penalty?

A. No, I didn't.

[fol. 43] Q. Has anyone in your family or any friend of yours been a victim of a crime of violence?

A. No.

Q. Have you ever served as a trial juror in a criminal case before?

A. No.

Q. Did your wife express an opinion to you?

A. Well, in a way. We have talked about it, yes.

Q. If you should bring back a verdict that was different from your wife's opinion, would that cause any embarrassment to you?

A. No, it wouldn't.

Q. If you had a son for example, on trial here for this same thing, would you be willing to have twelve jurors in the same frame of mine that you are now in deciding whether your son should be given life imprisonment or death?

A. I would.

Mr. Henson: We will pass Mr. Sonderup for cause.

Mr. Gustafson:

Q. Mr. Sonderup, do you know Mr. Henson?

A. No, I don't.

Q. Or his client, Mr. Moya?

A. No, I don't.

The Court: Do you want to take each juror this way instead of examining all of them?

Mr. Gustafson: This is what Counsel asked, your Honor.

[fol. 44] in Chambers.

The Court: Is that what you asked?

Mr. Henson: That is what I asked, your Honor.

Mr. Gustafson: Yes, that is what he asked.

The Court: I didn't understand that. It is all right, if you stipulate. Either way is all right.

Mr. Gustafson: I said I would be agreeable.

The Court: It is not objectionable to the Court if the defendant's attorney would rather do it this way, that is the way we will do it, one at a time.

Mr. Henson: I would prefer it that way, unless, your Honor wants to do it the other way.

The Court: All right, if you want to do it that way, we will.

Mr. Gustafson:

Q. You understand from what Judge Blackstock said, that in this case there is only one thing to determine because Mr. Moya has pleaded guilty to murder in the first degree of Olga Duncan, and the only question is shall he be given life imprisonment as the penalty or death as the penalty. Now, I know that you heretofore said to answer to Judge Blackstock's question, Mr. Sonderup, that you didn't have any conscientious opinion regarding the death penalty that would preclude you from voting for such a penalty in this particular case; nevertheless, I want to ask it again, principally because, to be very frank about it, sometimes a person, when asked that question, immediately [fol. 45] upon getting into the jury box, will say no he has no objection, but as he sits there and thinks about it for awhile, he begins to get worried about it, and we have had the experience where sometimes somebody has changed his mind and said, "No, I think I do have that objection after I thought it over," so, because I'm representing the plaintiff in this case, the People of the State of California, and intend to ask the jury to return the death penalty, I want to ask you again personally whether you have any conscientious opinions or scruples pertaining to the death penalty that would keep you from voting for such a verdict if you thought it would be an appropriate one.

A. No, I don't.

Q. Now, you answered Mr. Henson's question and said that you wouldn't automatically pose the death penalty just because this was a first degree murder or because it was a willful, deliberate, premeditated murder. On the other hand, Mr. Sonderup, would you, if you considered and thought in your own mind that the very manner in which Mr. Moya killed Olga Duncan deserved, the very manner which he did it, makes it clear that he deserves to be given

the penalty of death, you wouldn't hesitate then to vote on that basis, would you?

Mr. Henson: I object to that question, your Honor, as calling upon the juror to pre-judge the case.

The Court: Yes. The objection is sustained.

Mr. Gustafson:

Q. You, Mr. Sonderup, would nevertheless give weight, would you not, if the judge tells you to, to any considera-
[fol. 46] tions whatever, which in your judgment indicates that the penalty should be death?

Mr. Henson: Object to that question, your Honor, as attempting to pre-instruct the juror on the law in the case, which is your duty.

The Court: Read that question, please.

(Pending question read.)

You'd better reframe the question.

Mr. Gustafson:

Q. Mr. Sonderup, since this is a matter which the judge has already told you is a matter that is entirely in your discretion, that is whether to impose the penalty of death or the penalty of life imprisonment, then, going by what the judge says, whatever impresses you in the evidence presented here in court as calling for one penalty or the other you will feel free to so vote, will you not?

A. Yes.

Q. And, if the thing that impresses you in this evidence is one that calls for the death penalty, then you wouldn't hesitate to return the verdict calling for death, would you?

A. No.

Mr. Gustafson: Pass for cause.

Mr. Henson:

Q. Mrs. Thompson, what is your occupation?

A. I'm a stenographer for Richfield Oil.

Q. I'm sorry?

[fol. 47] A. Stenographer for Richfield Oil.

Q. And you work up in Ojai?
A. Ojai.
Q. Do you live in Ojai?
A. No, I live in Ventura.
Q. What is your husband's occupation?
A. I am divorced.
Q. Do you have any children?
A. No, sir.
Q. You have stated you have no conscientious objections to the death penalty, but do you believe that it should be imposed in every case of first degree murder?
A. Not every case, no.
Q. Do you believe that it should be imposed in every case where the first degree murder is perpetrated by willful, deliberate and premeditated means?
A. Depending on the case, no.
Q. You have no doubt read about this case in the newspapers, is that correct?
A. I have.
Q. Have you seen it or commented upon on television, perhaps newscasts?
A. On newscasts, yes.
Q. Have you heard it commented on on the radio?
A. Ye[redacted]
Q. What newspaper do you subscribe to, if you do?
[fol. 48] A. I do not. I read the Star, though.
Q. You read the Star-Free Press. Do you recall when the case first came up back in December, when Olga Duncan's body was first found, do you recall at that time the District Attorney making a statement that all of the — that the perpetrators of this crime should be given the death penalty?
A. No, I don't think I recall reading that.
Q. Do you recall any public statements printed in the Ventura Star-Free Press by the District Attorney at that time or thereabouts concerning what penalty should be imposed upon the defendants.
A. No, I didn't really follow it too closely.
Q. Do you have any friends or acquaintances who served as trial jurors in the case of the co-defendants, Elizabeth Duncan and Augustine Baldonado?
A. Yes, I do, a woman I work with.

Q. A woman you work with?

A. A man.

Q. A man you work with actually served on one of the other two juries?

A. Yes.

Q. Which jury did he serve on?

A. Baldonado.

Q. Baldonado?

A. Yes.

Q. Did he discuss with you the Baldonado case?

[fol. 49) A. No. I just work with the man in the office.

Q. You're aware that on the jury he sat on sentenced or at least brought back the verdict imposing the death penalty on Baldonado?

A. Yes, sir.

Q. The mere fact the death penalties have been brought back in verdicts in the cases of Elizabeth Duncan and Baldonado, that the death penalty necessarily should be imposed upon this defendant?

A. Yes, I'm afraid so.

Mr. Henson: I challenge this juror for cause, your Honor.

The Court: You understand, do you not, that there will be evidence adduced in this case for your benefit so that you can make up your mind what penalty to impose upon this defendant. It is entirely within the discretion of the jury. You can either impose the death penalty or life imprisonment, one or the other, and there will be probably quite a volume of evidence adduced here for your benefit, and after you consider all that evidence you must predicate your verdict in any event upon the evidence adduced in this case, not on anything else. What you hear now in this case must guide you to render a verdict of either death or life imprisonment. Now, would you predicate your verdict, whatever it may be, entirely upon the evidence that is adduced in this case, regardless of what has happened in any other case?

Prospective Juror: I can't really say so.

[fol. 50] The Court: What?

Prospective Juror: I can't really say that I would.

The Court: You don't think that you could?

Prospective Juror: No.

Mr. Gustafson: May I ask the juror a question on voir dire?

The Court: Yes.

Mr. Gustafson: Mrs. Thompson, with respect to this matter, and I see what is bothering you, if you were told that this is one of the matters which you may consider in fixing the penalty, namely, that the other two persons received the death penalty, that that was one thing that you could consider among other things, would you accept that as a proper basis; that is, would you accept that law if given to you by the Judge?

Mr. Henson: I object to that question, your Honor, as an improper statement of the law. Each case is decided on the evidence in here, and each case is decided on its own merits and that is not something that is to be considered, what sentence the co-defendants may have received.

Mr. Gustafson: I beg to differ with that, your Honor, I think it is a perfectly appropriate consideration for the jury.

Mr. Henson: I believe, your Honor, this jury——

The Court: They can consider what happened in one of the other cases?

Mr. Gustafson: Yes, to consider the penalty that has [fol. 51] been imposed on co-defendants in the same situation is a factor, not, of course, conclusive at all. It is certainly one thing the jury may consider.

Mr. Henson: This juror has stated, your Honor, that the mere fact that the other two co-defendants received the death penalty, that she believes the death penalty should be imposed on this defendant, for that sole reason.

Mr. Gustafson: That is what I was attempting to get at. I would say it was improper and she would be disqualified as a juror if she would for that reason alone do that, but I don't know whether she now understands that it is proper that it may be considered as one factor.

The Court: I think the objection is good, and it is sustained. I don't think—and it's material what some other jury did. I think it's entirely immaterial.

Mr. Gustafson: I have no further questions of this juror then, your Honor.

The Court: Go ahead.

Mr. Henson: I believe that the juror should be excused, and I do challenge her for cause, your Honor.

The Court: You're excused. Call another name.

Mr. Henson: Thank you very much Mrs. Thompson.

The Clerk: Earl S. Casteel, C-a-s-t-e-e-l.

(Prospective juror sworn by the Clerk.)

Please be seated, Mr. Casteel.

The Court: Mr. Casteel, where do you live?

[fol. 52] Prospective Juror: Fillmore.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do.

The Court: You're excused.

Mr. Gustafson: Challenge for cause.

The Court: Call another name.

The Clerk: Barbara Price, P-r-i-c-e. Is that Mrs. Price?

Prospective Juror: Yes.

The Clerk: Mrs. Price, your Honor.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Price, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, I don't.

The Court: All right. Just have that seat back there. You may inquire.

Mr. Henson:

Q. Mrs. Price, where do you live?

A. Point Mugu.

Q. On the navy installation there itself?

A. Yes, I do.

Q. Do you also work there?

A. No, I don't.

Q. Are you a housewife?

A. Yes, sir.

Q. Do you have any children?

[fol. 53] A. No.

Q. Where does your husband work?

A. He is in Guided Missile Unit 41 on board the station.

Q. Is he actually in the military service?
A. Yes, he is.
Q. In the navy, is that right?
A. Yes.
Q. Do you know the District Attorney, Mr. Gustafson, seated here?
A. No, I dont.
Q. Do you know any of the members of his staff?
A. No.
Q. Do you know any police officers?
A. No.
Q. Anyone in your family connected with law enforcement work?
A. No.
Q. Is your husband, if it's not classified, connected with security work?
A. Well, to a certain extent he is. My husband is a Chief Yeoman, and he does quite a bit of paper work.
Q. Yes, but I mean he is not—
A. No, he is not in the security part.
Q. How long have you lived in the County of Ventura?
A. It will be three years July 23rd.
[fol. 54] Q. Did you read about this Duncan murder case in the newspapers?
A. Yes, I did.
Q. What newspaper do you subscribe to, or do you?
A. The Oxnard Press Courier.
Q. Did you read in the Oxnard Press Courier the fact that the co-defendant Elizabeth Duncan received the death penalty in this case?
A. Oh, yes.
Q. Did you read in the Oxnard Press Courier that the co-defendant Baldonado also received the death penalty?
A. Yes.
Q. And in particular one item in the Oxnard Press Courier, do you recall an item here about Judge Blaekstock complimented the jurors as thoughtful and conscientious, and said they showed the proper amount of courage and, "I'm proud of you"?
A. No, I don't remember reading that.
Q. Would the fact that the co-defendants received the death penalty in this case, and if it were true that the judge complimented the jury——

Mr. Gustafson: Now, I'm going to object to that, your Honor. It is based on something that this juror has said she has not heard of. I don't see what Counsel is trying to do here, except to inject in this thing something he knows is highly improper.

[fol. 55] Mr. Henson: It is not highly improper, but I will withdraw that question and reframe the question.

Q. Would the mere fact that the co-defendants in this case, namely Elizabeth Duncan and Augustine Baldonado, received the death penalty, mean to you necessarily that this defendant, Luis Moya, should receive the death penalty?

A. I think so. It would to me.

Q. And do you feel that the co-defendants in this case should be treated all the same, is that right?

A. In this case, I do.

Q. And no matter what the evidence was presented before you here, you would still feel that way when you deliberated in the jury room?

A. Well, no. That is my opinion now. I do have an opinion about that, but what would happen later, I don't know.

The Court: You understand, do you not, that you must predicate your verdict on the evidence you hear here in this case?

Prospective Juror: Yes, sir, I know that.

The Court: Not on some other case that you happen to know about.

Prospective Juror: Yes, sir.

The Court: Would you base your verdict entirely on the evidence you hear in this case? That is what is required of you under the law if you serve on this jury——

Prospective Juror: Yes.

[fol. 56] The Court: You will listen to the evidence in this case. It may be the same as the other case or it may be entirely different. Nobody knows. I don't know; but you will be instructed that you must predicate your verdict on the evidence that you hear in this case, and if you're convinced from the evidence that you hear in this case that you should exercise your discretion in imposing the death penalty, you will do that; but, if after considering all of

the evidence in this case, you think it would be proper to impose life imprisonment, why you will do that, wouldn't you?

Prospective Juror: Yes, yes.

Mr. Henson:

Q. This opinion that you now have though, Mrs. Price, would that opinion stay with you throughout this trial and during your deliberations as a juror?

A. Well, I couldn't say, really. I don't know whether it would stay with me or not.

Q. I know it's hard to really know just what goes on in your mind, but we will just call for your best estimate.

A. Yes.

Mr. Gustafson: Your Honor, I'm going to object to the question on the ground that it is completely immaterial whether the opinion does or doesn't stay with the juror. It is a question whether the juror can not, withstanding the opinion, listen to the evidence and give a fair and impartial trial.

The Court: I think that is correct.

Mr. Henson: Your Honor, I'm trying to get at it a [fol. 57] different way. It means the same thing.

The Court: She says that she will base or predicate her verdict entirely upon the evidence that she hears in this particular case, regardless of anything that she knows or thinks she knows about the case in general. The evidence might show—she says the evidence might indicate to her that she should impose the death penalty or it might indicate to her that it would be better to impose the sentence of life imprisonment. She says whichever one appears to her from the evidence in this case is what she will be guided by.

Mr. Henson: Well, she said that, your Honor, but she said before that she had an opinion already, and I'm asking her whether or not that opinion that she has now might be considered along with the evidence in arriving at a verdict.

The Court: You understand it would be your duty to set aside any opinion that you might have now and predicate your verdict entirely on the evidence you hear in this case. You understand that, don't you?

Prospective Juror: Yes, yes.

The Court: And that is what you will do, won't you?

Prospective Juror: No, I'm sorry, I don't think I could.

The Court: You think you will be influenced by some opinion that you have now?

Prospective Juror: Yes, I'm afraid I would.

Mr. Henson: I challenge the juror for cause then, [fol. 58] your Honor.

The Court: All right. The challenge is allowed. You're excused.

It is ten minutes past eleven. We'd better have a few minutes recess as usual.

The prospective jurors are excused for a few minutes until the Bailiff calls you. You will be in a minute. I think we better fill the jury box first.

The Clerk: Lorraine E. Hanson, H-a-n-s-o-n. Is that Mrs. Hanson?

Prospective Juror: Yes.

The Court: Is that Mrs.?

The Clerk: Yes, your Honor.

(Prospective juror sworn by the clerk.)

The Court: Just have that seat back there Mrs. Hanson. We will take a few minutes recess. You're excused, the prospective jury is excused until the Bailiff calls you.

(Recess.)

The Court: The jurors will take the same seats as you were in in the first place.

The Clerk: The District Attorney will be right here. He stepped out for just a moment; he will be right back.

The Court: Mrs. Hanson, is it?

Prospective Juror: Yes, sir.

The Court: Mrs. Hanson, do you have any conscientious scruples against imposing the death penalty in a murder case?

[fol. 59] Prospective Juror: No, sir.

The Court: All right, you may inquire. She says no.

Mr. Henson: That is Mrs. Hanson, is that correct?

Prospective Juror: Yes.

Mr. Henson:

Q. What is your occupation?

A. I'm a cashier for the Edison Company.

Q. And where is that?
A. In Oxnard.
Q. In Oxnard. Do you have any children?
A. Yes, sir.
Q. How many children do you have?
A. Two.
Q. What are their ages?
A. Nineteen and sixteen.
Q. Your husband's occupation is what?
A. I'm divorced.
Q. Does anyone that you—any friends of yours or your own children have been charged with being delinquent children or anything of the sort?
A. No, sir.
Q. Are you personally acquainted with the District Attorney, Mr. Gustafson?
A. No.
Q. Are you personally acquainted with any of the members of his stag?
[fol. 60] A. No, sir.
Q. For example. Mr. Henderson here, the one seated on the third seat from the end, do you know him at all?
A. No.
Q. Are you personally acquainted with any police officers?
A. Yes, sir.
Q. Who is that?

Mr. Gustafson: I'm going to object to that as incompetent, irrelevant and immaterial.

The Court: This is whether you are personally acquainted with a police officer?

Mr. Gustafson: Yes.

The Court: I don't see the materiality of that, Mr. Henson.

Mr. Henson: I will withdraw the question then.

Q. As we have stated before, Mrs. Hanson, this case involves one of the defendants in the Olga Duncan murder case. And you have read about this case in the newspapers, have you not?
A. Yes, I have.
Q. And did you read in the newspapers that the co-

defendants in this case, Elizabeth Duncan and Augustine Baldonado, both received the death penalty; did you read that?

A. That they should?

Q. No, that they did actually.

[fol. 61] The Court: Did you read about that, he says.

Prospective Juror: Yes.

Mr. Henson:

Q. You did?

A. Yes.

Q. Do you believe now that the mere fact that the two co-defendants in this case, namely, Elizabeth Duncan and Augustine Baldonado, received the death penalty, that necessarily Luis Moya, seated here, should receive the death penalty?

A. No.

Q. So that the evidence should show that otherwise he should receive life imprisonment, why you wouldn't allow the fact that the other two defendants received the death penalty to influence your decision?

A. No. I think I would decide on the evidence presented.

Q. Do you have any opinion about this case, so far as the penalty of the defendant is concerned?

Mr. Gustafson: I'm going to object to that as incompetent, irrelevant and immaterial in so far as it asks for her opinion on the case that is not before this jury.

Mr. Henson: The title of the action is The People versus the three defendants, your Honor, and that's the case title and I'm asking her if she has any opinion as to what penalty should be imposed upon the defendants in this case.

Mr. Gustafson: That is exactly the vice of it. He is asking what should be imposed on the defendants, and there are two defendants who are not before this jury for [fol. 62] this purpose.

The Court: No, these defendants, he says he means, I take it upon this defendant.

Mr. Gustafson: No, he doesn't.

Mr. Henson: I will rephrase it.

The Court: He didn't say that, but I thought that was what he meant.

Mr. Henson: I will rephrase it then.

Q. In so far as this defendant, Luis Moya, is concerned, do you have an opinion as to what penalty should be imposed upon him at this time?

A. Yes, I have an opinion.

Q. And notwithstanding—I mean even though you listen to the evidence, would that opinion that you have now enter into your verdict and your deliberation for that verdict?

A. No. I would try to keep an open mind and listen to the evidence presented.

The Court: You understand, do you not, or you will be instructed that your verdict, if you serve as a juror in this case, must be predicated or based entirely and absolutely upon the evidence that is adduced in this particular case and nothing else. You will follow that instruction, won't you?

Prospective Juror: Yes, sir, I understand that.

The Court: And if you have an opinion about what penalty should be imposed, you will set that entirely aside and predicate your verdict upon the evidence that you hear right here in this case, won't you?

[fol. 63] Prospective Juror: Yes, sir.

Mr. Henson:

Q. Even though you do have an opinion at this time, you will put aside that opinion and consider the evidence in arriving at your verdict, is that correct?

A. I will, sir.

Q. All right. Now, you stated you have no conscientious objection to the death penalty as such, but do you believe that every person who has committed a willful, deliberate, premeditated murder should be given the death penalty?

A. No.

Q. Have you talked to any police officers about this case?

A. Not this particular case.

Q. Did you talk to any police officers about the Olga Duncan murder case in general?

A. Yes.

Mr. Gustafson: Objected to as incompetent, irrelevant and immaterial.

The Court: Read that question.

(Question read.)

The Court: The answer is yes, she has talked to some police officer. I don't think it makes any difference whether she has or not, but I think you have a right to show she did talk to him and then to find out whether or not it made any difference. The objection is overruled.

[fol. 64] I didn't think she answered yes.

Mr. Henson: She did.

Mr. Gustafson: She did? All right.

Mr. Henson:

Q. Did the police officer with whom you talked about the Olga Duncan murder case purport to have personal knowledge about the case?

A. No.

Q. Did they say that they had worked on the case—

A. No.

Q. —themselves? Were these Oxnard police officers?

A. No.

Q. Sheriff's Department officers?

A. No.

Q. Are you acquainted with Detective Ray Higgins?

A. No, sir.

Q. We can assume just for this question that one of your children, the nineteen and the seventeen-year-olds, were on trial in a case just like this one, would you be willing to have twelve people in the same frame of mind that you are now in hearing that case and deciding whether your son or your daughter should be given life imprisonment or death?

Mr. Gustafson: I'm going to object to that question, your Honor, as incompetent, irrelevant and immaterial in as much as it assumes something that cannot possibly be true, that a seventeen-year-old person could be on trial in this thing with the penalty.

[fol. 65] The Court: Yes, the objection is sustained to

that particular question. I can understand that some similar question might be competent.

Mr. Henson:

Q. That is true, Mrs. Hanson, any person under the age of eighteen in California is not punishable by death. Let's assume the nineteen-year-old then was on trial in a similar case as this one. Would you be willing to have twelve people in the same frame of mind that you're now in decide whether your nineteen-year-old son or daughter should be given life imprisonment or death?

A. Yes.

Q. All right.

Mr. Henson: We will pass Mrs. Hanson for cause.

Mr. Gustafson: I pass her for cause.

Mr. Henson:

Q. Mrs. Germann, is that correct?

A. Yes.

Q. Where do you live?

A. In Simi.

Q. Do you have an occupation?

A. Part-time, drug clerk.

Q. What is your husband's occupation?

A. He is a machinist.

Q. And for whom is he employed?

A. Turbo-Products in Pacoima.

Q. Do you have children?

A. No.

[fol. 66] Q. I wonder what paper you subscribe to or you read out in Simi?

A. The Oxnard Press Courier.

Q. And you no doubt read about the Olga Duncan murder case in the Oxnard Press Courier?

A. Yes.

Q. And did you read that the co-defendants, the defendants, Elizabeth Duncan and Augustine Baldonado, both received the death penalty?

A. Yes, I did.

Q. And did you read in the Oxnard Press Courier that Judge Blackstock complimented the jury in the Augustine Baldonado case for their verdict?

A. Yes, I did.

Q. You no doubt know of Judge Blackstock, do you not?

A. Yes.

Q. And like all of the rest of the people in the county, do you think a lot of him?

A. Well, I know he has been a judge in the county for a long time, yes.

Q. He is considered the Dean of judges—

A. Yes.

Mr. Gustafson: I'm going to object to all of those questions as being incompetent, irrelevant and immaterial.

The Court: Yes, I think so.

[fol. 67] Mr. Henson:

Q. The fact that you read that Judge Blackstock complimented the jury when they returned the verdict of death against Augustine Baldonado, would that influence your decision in this case?

A. No.

Q. Do you feel that the mere fact that the two defendants received the death penalty in this case, that this defendant should receive the death penalty also?

A. No.

The Court: This jury understands too, I think, that even if I did compliment the jury in some other case, which I think I did, that's entirely immaterial. That doesn't mean that I'm going to be of the same opinion in this case. Every case presents its own features, and this case may be entirely different from either of the other cases for all I know. I might have an entirely different opinion. What my opinion was is absolutely immaterial. It's the opinion of the jury that counts. That opinion must be predicated absolutely and entirely upon the evidence adduced in this particular case. You understand that, do you?

Prospective Juror: Yes.

The Court: All right.

Mr. Henson:

Q. Have you discussed the Olga Duncan murder case with your husband or anyone else?

A. Yes.

Q. And in the discussions, did you state what your [fol. 68] opinion was as far as the penalty for defendant Luis Moya is concerned or for all of the defendants?

A. No, I don't believe I did. I had to express an opinion by what I heard myself.

Q. The people expressed opinions to you?

A. Yes.

Q. Did these people express opinions as to what penalty should be imposed upon the three defendants?

A. Yes.

Mr. Gustafson: Objected to as incompetent, irrelevant and immaterial. Move to strike the answer for the purpose of the objection.

The Court: That is, did she talk to someone and they express an opinion?

Mr. Henson: They expressed an opinion to her concerning what disposition, what penalty should be imposed upon the three defendants in that case, and I will rephrase it, "Including Luis Moya?"

The Court: The objection is overruled. The next question or a similar one, I assume, would be whether that opinion had any effect on her, and whether she would always have it and whether it will affect her verdict in this case.

Mr. Henson: That is correct, your Honor.

Mr. Gustafson: She hasn't stated that she had an opinion nor was it the question directed as to whether she had an opinion, it was as to whether other people had opinions.

[fol. 69] The Court: The other question is purely preliminary. She knows that other people have an opinion, and I think they have a right to discover whether or not that has any effect on this particular prospective jury or juror.

Mr. Henson:

Q. Mrs. Germann, do you remember my question?

A. Yes.

Q. Did other people—have other people expressed opinions to you as to what penalty should be imposed upon the three defendants in the Olga Duncan murder case, which included this defendant?

A. One person.

The Court: That is a different question. You had better restrict it to this case.

Mr. Gustafson: It wasn't so restricted before either, your Honor.

The Court: If that was the objection, I think the objection was good. I didn't understand that that was the case. Confine your questions to Mr. Moya in this case, and I will overrule the objection.

Mr. Henson: All right.

Q. Did other people express opinions to you concerning what penalty should be imposed upon Luis Moya as a defendant in the Olga Duncan murder case?

A. Not persons, one person did, yes.

Q. Was that person a friend of yours?

[fol. 70] A. Yes.

Q. A member of your family?

A. No.

Q. In the event that you should think otherwise than that person, would it be embarrassing to you to see that person?

A. No.

Q. You wouldn't care even though you voted differently from that person?

A. No.

Q. Any member of your family or any friend of yours serve as a trial juror in the other cases?

A. No.

Q. This one person that you talked to, was it a member of any law enforcement agency.

A. No.

Q. Are you personally acquainted with any of the law enforcement officers in Simi area?

A. No—I beg your pardon, yes, I am.

Q. Did that person discuss, that law enforcement officer discuss this case with you?

A. No.

Q. Are you personally acquainted with the District Attorney, Mr. Gustafson?

A. No.

Q. Do you know any of the members of his staff?

[fol. 71] A. No.

Q. Has any member of your family been a law enforcement officer anywhere?

A. Special Deputy Sheriff.
Q. Who was that?
A. My husband. I might say that he hasn't since this case has been in session.
Q. I see. He was a Special Deputy under Sheriff Suiter, is that right?
A. Yes—no, it was the other Sheriff.

Mr. Gustafson: Sterry.

Mr. Henson:

Q. And the fact that Mr. Gustafson is the District Attorney of the County of Ventura, the mere fact that he does have a public office, will you give more weight to what he says, or pay more attention to what he says than say myself as just a private attorney?
A. No.
Q. And the fact that he has a number of officers sitting behind him here to assist him in the case and I do not, is that going to influence your decision in this case?
A. No.
Q. And the fact that the Sheriff of Ventura County has seen fit to place one Deputy over there to the left of Mr. Moya and one Deputy behind him going to influence your decision in this case?
A. No.

[fol. 72] Mr. Henson: We will pass Mrs. Germann for cause, your Honor.

Mr. Gustafson:

Q. You don't know Mr. Henson, do you, Mrs. Germann?
A. No.
Q. Or Mr. Moya?
A. No.

Mr. Gustafson: Pass for cause.
Mr. Henson: Mrs. Varela?
Prospective Juror: Yes.

Mr. Henson:

Q. What is your occupation?
A. Housewife.

Q. Is there a Mr. Varela?
A. Yes.
Q. Do you have children?
A. Yes.
Q. And what are the ages of those children?
A. Eleven—I mean thirteen, eleven and six months.
Q. Where is your husband employed?
A. It's that milling company, truck driver.
Q. What is his particular duty there?
A. Truck driver.
Q. Have you discussed this Olga Duncan murder case with your husband?
A. Yes.
Q. Did you form any opinion as to what penalty should [fol. 73] be imposed upon the defendant Luis Moya?
A. Yes.
Q. You did.
A. Yes, I did.
Q. And do you feel that that opinion is going to affect your hearing of this case?
A. Yes.
Q. And even though there is evidence presented in this case, you will find that you cannot put aside that opinion that you have, is that right?
A. Yes.
Q. And even if the judge instructs you that you should put aside your opinion, you could not do so, is that right?
A. No.

Mr. Henson: I challenge this juror for cause, your Honor.
The Court: Is the challenge resisted at all?
Mr. Gustafson: No, your honor.
The Court: You're excused.
Mr. Henson: Thank you, Mrs. Varela.
The Court: Call another name.
The Clerk: Eleanor C. Weidemann, W-e-i-d-e-m-a-n-n, Mrs. Weidemann, is that correct?
Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

[fol. 74] The Clerk: Be seated.
The Court: Mrs. Weidemann, you have been here all

morning, so you know generally what this case is all about; is that right?

Prospective Juror: Yes, your Honor.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do not.

The Court: All right, you may inquire.

Mr. Henson:

Q. Mrs. Weidemann, what is your occupation?

A. I'm a homemaker.

Q. Do you have children?

A. I do not.

Q. Where is your husband employed?

A. Pacific Missile Range, Point Mugu.

Q. Is he in the military service?

A. No.

Q. Is he a police officer or security officer in any way?

A. No.

Q. While you have no conscientious objection to the death penalty, do you feel that the death penalty should be imposed in every case of willful, deliberate and premeditated murder?

A. I do not.

[fol. 75] Q. Do you subscribe to the Oxnard Press Courier, do you?

A. The Ventura Star-Free Press. I live here in Ventura.

Q. Oh, I'm sorry. You no doubt read about the Olga Duncan murder case in the Ventura Star-Free Press?

A. Yes.

Q. Do you recall when the first time that the body of Olga Duncan was found and before the Grand Jury had acted upon the case or anything, the District Attorney here making a statement which appeared on the front page that the perpetrators of this crime should be given the death penalty?

A. I believe I do.

Q. Do you know Mr. Gustafson?

A. I do not.

Q. Do you know any of the members of his staff?

A. No.

Q. Are you personally acquainted with any police officers?

A. No.

Q. Would the fact that the District Attorney as a public official in this county, with the duty of law enforcement, makes the statement before the case goes to court that the perpetrators of this crime should be given the death penalty, effect you in any way?

A. No.

[fol. 76] Q. Even though he is the, you might say, the chief law enforcement officer——

A. That is right.

Q. The fact that he made that statement would not effect your decision?

A. No.

The Court: The answer is no. In each instance answer up yes or no. The court reporter can't get the nod of your head unless she happens to be looking at you. I know you said no, but the second time you rather nodded your head.

Prospective Juror: Oh, I'm sorry.

Mr. Henson:

Q. Mrs. Weidemann, I will sit back here, and then she can take it down. It's my fault.

The Court: You see, the court reporter has to take down every word that is said here by the juror or anybody else.

Mr. Henson:

Q. Did you read in the Ventura Star-Free Press all about the Elizabeth Duncan trial?

A. Yes.

Q. Did you see photographs of courtroom procedure?

A. Yes.

Q. Did you see photographs of witnesses on the witness stand?

Mr. Gustafson: I'm going to object to that, your Honor, as incompetent, irrelevant and immaterial.

The Court: I think so. The objection is sustained.

Mr. Henson:

Q. I will ask this question: In connection with the [fol. 77] Elizabeth Duncan trial, did you see a photograph on the front page of the Ventura Star-Free Press of defendant Luis Moya testifying on the witness stand?

Mr. Gustafson: Objected to as incompetent, irrelevant and immaterial. What this has to do with the juror's qualifications or disqualifications for cause is something that isn't apparent to me.

The Court: The objection is sustained.

Mr. Henson:

Q. Let me ask you this, Mrs. Weidemann, Mrs. Weidemann?

A. Weidemann.

The Court: Mrs. Weidemann, you understand, do you not, that this jury or any jury that tries this case will be instructed that their verdict must be predicated or based entirely upon the evidence adduced right here in this particular case against Moya; you understand that, do you not?

Prospective Juror: I do, your Honor.

The Court: You wouldn't be permitted to consider anything that you saw in a newspaper, a photograph or anything else, you're not permitted to consider that unless it's adduced here, unless that is shown to you in this particular case, you understand that?

Prospective Juror: I do.

The Court: That's the reason I sustained the objection on the ground that it's immaterial.

Mr. Henson:

Q. Mrs. Weidemann, let me ask you this: As a result of [fol. 78] reading in the newspapers about the Olga Duncan murder case and the trials of Elizabeth Duncan and Augustine Baldonado, did you form any opinion as to what penalty should be imposed upon this defendant Luis Moya?

A. Yes.

Q. Do you have that opinion now?

A. At this moment, yes.

Q. Would it take evidence to remove that opinion from your mind?

A. Yes.

Q. Even though Judge Blackstock instructs you that you must disregard your personal opinions in this case, could you do that? That is, do you think you could possibly wipe this opinion out of your mind and judge this case just on the evidence here?

Mr. Gustafson: I'm objecting to that, your Honor, as something that assumes a qualification that the law doesn't. The law doesn't require that any juror wipe an opinion out of his mind. It simply is that the juror, notwithstanding the opinion, can fairly and impartially try the case.

The Court: That's right.

Mr. Henson: All right. I'll reframe the question.

Q. Even though you do have this opinion as to what penalty should be imposed upon this boy, you think that notwithstanding that opinion, you could judge this case fairly and impartially?

[fol. 79] A. I feel that I could.

Q. Would it be difficult for you to do so?

A. I don't think so.

Q. I appreciate your being so honest.

The Court: She has already said she would predicate any opinion that she might arrive at entirely and absolutely upon the evidence that she hears in this case, and I don't see any point in repeating the same questions that are propounded by the court.

Mr. Henson: Well, it's only this, your Honor, I don't mean to prolong this, but sometimes people don't quite understand, and I'm just trying to bring it out a little bit more here in a different way.

The Court: Well, you can't assume that an intelligent looking person doesn't understand a plain unequivocal queston. You understand absolutely that any verdict you arrive at must be predicated or based on the evidence in this particular case right here that we're trying now. You understand that, don't you?

Prospective Juror: I do, your Honor.

Mr. Henson: Well, your Honor, even though she understands it, I'm asking if she could do that?

The Court: Well, she already told me that she can do it and that she will do it; isn't that right?

Prospective Juror: That is right.

Mr. Henson: We will pass Mrs. Weidemann—Mrs. Weidemann for cause.

[fol. 80] Mr. Gustafson:

Q. Mrs. Weidemann, do you know Mr. Henson?
A. I do not.
Q. You don't know Mr. Moya?
A. No.

Mr. Gustafson: Pass for cause. No questions.
Mr. Henson: Mr. Wichman, is it?
Prospective Juror: Correct.

Mr. Henson:

Q. What is your occupation, sir?
A. Assistant Operator, Shell Oil Company, the gasoline plant.
Q. Where is that gasoline plant?
A. On "T" Avenue.
Q. Are you married, sir?
A. Yes.
Q. Do you have children?
A. Two, five and eight.
Q. Does your wife work, or does she take care of the children?
A. No. She has a part-time job.
Q. How long have you lived in the county, sir?
A. Oh, close to eleven years.
Q. Are you personally acquainted with the District Attorney, Mr. Gustafson?
A. No, I'm not.
Q. Are you personally acquainted with any of the [fol. 81] members of his staff?
A. No.
Q. Are you personally acquainted with any members of the Ventura County Sheriff's Department?
A. Oh, I have met Sheriff Hill several times.
Q. When he was campaigning for election? Is that right?
A. No, not at that particular time.
Q. Has any member of your family or any personal acquaintances of yours been a victim of a crime of violence?

A. No.

Q. Have you ever served as a trial juror before?

A. No.

Q. You read the Ventura Star-Free Press, do you?

A. Yes.

Q. You have no doubt read about the Olga Duncan murder?

A. Yes.

Q. Did you see movies of this case or pictures of this case on television news broadcasts?

A. Very little if any.

Q. But you did see many photographs in the Ventura Star-Free Press about the case?

A. Yes.

Q. Did you read the particular statements that the District Attorney, Mr. Gustafson, made, when the body was [fol. 82] first found, about, in substance, that the perpetrators of this crime should receive the death penalty?

Mr. Gustafson: Your Honor, I have allowed that question to go on three or four times, and I'm going to object now. Counsel knows very well what that statement said, and he has been furnished with affidavits, and it did not say that.

Mr. Henson: Well, I have the statement right here.

Mr. Gustafson: Yes, you can say that these defendants should receive the death penalty, that statement——

Mr. Henson: That is what I just said. Are you objecting to it?

Mr. Gustafson: Yes, I'm——

Mr. Henson: I think the question was well stated, your Honor, and I'll let your Honor rule on it.

The Court: Well, reframe the question. Put it to the jury again.

Mr. Gustafson: He can certainly ask what the juror recalls reading without putting words, putting his own connotations on what the statement was.

Mr. Henson: Well, I'll just, to satisfy Mr. Gustafson here, Mr. Wichman, I'll show you a copy of the Ventura Star-Free Press, if you will excuse me——

The Court: Now, wait a minute. There is some question here now about your right to show some newspaper to this

juror. You're not introducing evidence now, you're examining this juror on the voir dire.

[fol. 83] Mr. Henson: Correct, your Honor. This newspaper I will refer to as Exhibit 3, which has heretofore been filed with this court as an exhibit.

The Court: Not in this case?

Mr. Henson: Yes.

The Court: In this particular case?

Mr. Henson: Not today. I filed it two months ago.

The Court: The trial here is purely and solely for the purpose of determining what penalty to impose. There are no exhibits yet.

Mr. Henson: No exhibits in this case, your Honor.

The Court: No evidence has been adduced yet in this case.

Mr. Henson: Well, I think I should be allowed, since the District Attorney has objected to my interpretations of his statement, that I think I should be allowed then——

The Court: It might be a juror has never read the statement. Why show it to her if she has never read it and couldn't be influenced by it, why show it to her now. You might ask her if she'd read a certain statement and read it, but not to show any newspaper to the jury.

Mr. Henson: Mr. Wichman, do you remember reading in the Ventura Star-Free Press a statement by the District Attorney, Mr. Gustafson here, at the time that Olga Duncan's body was found, which in substance said that he believed that the perpetrators of this crime should be given the death penalty?

[fols. 84-85] A. I may have, but since he is the prosecutor, he would have that privilege.

Q. Well, do you feel that he as a public official makes a statement like that, why it's the truth?

A. Not necessarily.

Mr. Gustafson: I'm going to object to that as being an unintelligible question. If I have given an opinion, how can Counsel ask whether that's the truth, my opinion.

The Court: The objection is sustained. You can ask the juror if the mere fact that the District Attorney thinks the death penalty should be imposed or thought it should be imposed in some cases, would influence you to impose it in

this case. If you ask him a question of that kind, I'll permit it.

Mr. Henson: I'll adopt Judge Blackstock's question.

Q. Did you hear what he said?

A. Yes.

Q. What would your answer be to that?

A. I will judge it on this trial itself.

Q. It wouldn't make any difference to you whether or not Mr. Gustafson had ever made a statement before the case was ever presented to court?

A. No.

The Court: You understand, of course, that you should base your verdict entirely on the evidence that is adduced in this case, and right here now in this case, and nothing else, don't you?

[fol. 86] Prospective Juror: True.

The Court: You have talked about co-defendants several times, there is really no co-defendants in this particular case. I know what you mean, they were all three indicted together and they were co-defendants under the indictment. There is only one defendant in this case. The other two defendants that were under indictment have already had their cases tried and they have been sentenced, so this defendant in this particular trial has no co-defendant; isn't that right?

Mr. Henson: Well, I don't know, your Honor. The title of the action is still People versus Elizabeth Duncan, and Augustine Baldonado and Luis Moya.

The Court: Yes, but they're not co-defendants in this case. They're not on trial here at all.

Mr. Henson: Well, I will not use that legal statement any further then.

The Court: Well, it is twelve o'clock. Ladies and gentlemen of this prospective jury and all of this jury panel, the court will adjourn until 1.45 this afternoon. Remember to be back here at 1.45. It is just as well that you do not discuss this case among yourselves or with anyone else. You're excused until 1.45.

(Recess.)

[fol. 87] Ventura, California, April 20, 1959. 1.45 p.m.

The Court: All right, the prospective jurors are in the box.

The Clerk: The District Attorney is on his way. He will be right here.

The Court: All right, the District Attorney is now present. You may proceed.

Mr. Henson: Your Honor, the Clerk has informed me that there is one prospective juror by the name of John Chapek who has a very bad back trouble and cannot sit for any length of time. He is now sitting in the audience, and I will agree to stipulate that John Chapek may be excused and need not sit here and further harm himself.

The Court: All right, he is excused.

Mr. Henson:

Q. Mr. Wichman, I believe we were talking when the noon recess came along. You do recall reading some statement that the District Attorney made about this case some time ago, is that right?

A. I am quite sure I did, yes. I'm not positive.

Q. You have certainly read other news articles about the case in the Ventura Star-Free Press?

A. Most of them, yes.

Q. And you have seen pictures of all of the participants in the Olga Duncan murder case, have you not?

A. Yes.

[fol. 88] Q. Have you heard the comments about the case from radio broadcasts?

A. Oh, to a small extent.

Q. Have you heard and seen commentaries on television news programs?

A. Yes, some of them.

Q. Have you discussed the case with your fellow employees or with your family?

A. Just in the normal manner that anybody would more or less.

Q. In other words, just about everybody you ran into was talking about the case, is that right?

A. Normally. I mean the same as you or anybody else would speak of it.

Q. I may have one idea about what is normal. What do you mean by normally?

A. Well, when a person is talking about current events, it is normally brought up in cases of this kind. Maybe once or twice a day in a conversation.

Q. I'm sorry I didn't hear you.

A. Maybe once or twice a day in a conversation.

Q. You have read, have you not, that the two other persons who were charged with the murder of Olga Duncan, namely, Elizabeth Ann Duncan and Augustine Baldonado, have been tried and sentenced to death?

A. Yes.

[fol. 89] Q. As a result of these discussions you have had and what you have read in the newspaper, do you have an opinion now as to what penalty should be imposed upon the defendant Luis Moya?

A. Well, not exactly. I feel that this trial is for the purpose of determining that.

Q. But do you or do you not have an opinion now before the trial ever starts about what penalty should be imposed upon him?

A. I couldn't say exactly. That is why I'm here at the trial. I would like to determine that later on.

Q. Would the mere fact that you have heard that the two other people who had been charged with the murder of Olga Duncan received the death penalty have any bearing upon your decision in this case?

A. No, because the simple fact they were separate trials and if they were all tried at one time it could have a bearing, but I wouldn't say under the circumstances that it would affect me.

Q. Do you feel that every person who has committed willful, deliberate and premeditated murder should receive the death penalty?

A. No, there are no doubt a few circumstances where it wouldn't hold.

Q. Just a few circumstances where you say not?

A. Yes, possibly.

[fol. 90] Q. Would the fact that this boy here is of Mexican descent have any influence upon your decision?

A. No, it wouldn't.

Q. As you hear the evidence here, will you notwith-

standing any opinion that you might possibly have, will you still weigh and consider the evidence and exercise your discretion in this case?

A. I will.

Q. And when you—you don't form any opinion from the evidence until you have retired to the jury room to deliberate, will you?

A. No, I won't form a final opinion until then.

Q. After you retire to the jury room to deliberate, will you freely and openly discuss the evidence with your fellow jurors?

A. If that is the normal procedure, I feel that I would like to.

Q. In the event that all of the other eleven jurors feel one way about it and you feel the other way would you change your opinion just because all the other eleven feel differently?

A. No, I don't think I would unless they convince me that I was wrong.

Q. Well, would you change your vote just because all of the other eleven felt the other way?

Mr. Gustafson: It's already been answered. I object [fol. 91] to it, your Honor.

The Court: It has already been answered, and besides you will be instructed that you should freely discuss the evidence with your fellow jurors after you have gone into the jury room. It is your duty to freely discuss the evidence.

Prospective Juror: Yes.

The Court: And you will also be instructed that as long as you have an opinion, it is your duty to adhere to that opinion; but if you can be convinced that you're wrong, it's your duty to change your opinion. You will be instructed to that effect.

Mr. Henson:

Q. I don't know whether I asked you, but are you personally acquainted with the District Attorney, Mr. Gustafson here?

A. No, I'm not.

Q. And are you acquainted with any of the members of his office?

A. No.

Q. If you had a son twenty years old and on trial under similar situations as this, would you be willing to have twelve people in the same frame of mind as you are now in hearing the case and deciding whether he should be punished with life imprisonment or death?

A. I would say yes.

Mr. Henson: We will pass Mr. Wichman for cause.

Mr. Gustafson:

Q. Mr. Wichman, do you know Mr. Henson?

[fol. 92] A. No, I don't.

Q. Have you read in the newspapers any statements that he has made concerning this case?

A. No, I haven't.

Mr. Gustafson: Pass for cause.

Mr. Henson: Mrs. Conley, is it?

Prospective Juror: Yes, sir.

Mr. Henson:

Q. Where do you live?

A. Oxnard.

Q. Is there a Mr. Conley?

A. Yes, sir.

Q. What is his occupation?

A. Printer.

Q. Printer?

A. Yes.

Q. For whom?

A. Russell Recording in Ventura.

Q. Russell Recording in Ventura. Do you work any where, Mrs. Conley?

A. No, sir.

Q. Have you worked within the last few years?

A. I—just part-time. I helped out at Christmas time in a malt shop.

Q. Do you have children?

A. I do.

Q. What are their ages?

[fol. 93] A. Two sons, twenty and twenty-six.

Q. Any grandchildren?
A. No.
Q. Do you subscribe or read the Oxnard Press Courier?
A. Yes, I do.
Q. Did you read in the Oxnard Press Courier about the result in the Augustine Baldonado case?
A. I did.
Q. Did you read that he received the death penalty?
A. Yes, I did.
Q. And did you read the comments that were reported that Judge Blackstock made about complimenting the jury for their courage and intelligence?
A. I did.
Q. Do you know Judge Blackstock?
A. I do not.
Q. You have heard of him though, have you not?
A. Oh, yes.
Q. The fact that you have read such a comment as that influence your decision in this case against Luis Moya?
A. Not at all.
Q. The fact that both Elizabeth Duncan and Augustine Baldonado received the death penalty have any influence on you in this case?
A. No.
Q. Do you have any opinion now as to what penalty [fol. 94] should be imposed upon the defendant.
A. Well, truthfully, I thought I did, but I'm not sure that I really did. I think one should listen to the evidence.
Q. Well, I mean you're not just saying that so that the Judge or somebody won't—
A. No, because I feel there is always a reason for doubt, room for doubt.
The Court: You will decide this case entirely on the evidence that may be adduced in this case itself?
Prospective Juror: That's right.
The Court: And nothing else? Right?
Prospective Juror: Yes, sir.
The Court: Is that right?
Prospective Juror: Yes, sir.

Mr. Henson:

Q. Do you feel that in every case of willful, deliberate and premeditated murder, that the perpetrators should be given the death penalty?

A. Well, if it could be proven beyond a shadow of a doubt.

Q. In other words, in every case where it has been proven that the defendant has committed willful, deliberate and premeditated murder, you would vote for the death penalty, is that right?

A. Well, that is the way I feel now.

The Court: Well, wouldn't it depend upon the evidence [fol. 95] in the case?

Prospective Juror: Yes, that is true.

Mr. Henson:

Q. Well, Mrs. Conley, do you understand that the defendant here has pleaded guilty to willful, deliberate and premeditated murder, and there will be no question about that whatsoever.

A. Well, I just felt that there were things that could come up to prove differently.

The Court: There is only one question to be determined here, that is the penalty to be inflicted.

Prospective Juror: Oh.

The Court: You must inflict one of two penalties, either the death penalty or life imprisonment, one or the other. You have to make up your mind which one.

Prospective Juror: I see.

The Court: And you must predicate your verdict, no matter what it is, on the evidence adduced in this trial, and if you thought there was something in the case that justified your inflicting the death penalty, you do that, and if you thought there was something that justified your giving life imprisonment, you would do that, wouldn't you?

Prospective Juror: Yes, right.

Mr. Henson:

Q. Mrs. Conley, let me get this clear here now. Do you feel that in every case of willful, deliberate and premeditated murder, that the death penalty should be inflicted?

[fol. 96] A. I guess I would say no in that case, because there could be exceptions. I would want, like I say, to decide that.

The Court: You would want to be sure that the evidence showed something that justified life imprisonment, wouldn't you?

Prospective Juror: Yes, your Honor.

The Court: And if it did then, you wouldn't inflict the death penalty, and if it did not you might inflict the death penalty?

Prospective Juror: Yes, sir.

The Court: That's entirely within the discretion of the jury.

Mr. Henson:

Q. Mrs. Conley, would you require the defense to prove that the defendant should get life imprisonment?

Mr. Gustafson: Object to that, your Honor, as calling for the jurors knowledge of the law with respect to how the penalties are to be applied.

The Court: Would you require the defendant to prove—.

Mr. Gustafson: This juror doesn't know what is required in the way of proof by either Mr. Henson or myself. I have no objection to the question if Counsel will state the law to the juror first, namely, that there is no burden of proof on either of us. In its present form, I object to it, your Honor.

The Court: All right, in its present form, it is sustained.

[fol. 97] Mr. Henson:

Q. If the judge instructs you that there is no burden upon the defendant to prove that the defendant should get life imprisonment, and there is no burden upon the prosecution to prove that he should get the death penalty, but that it is completely within your discretion either way, would you follow such an instruction?

A. Yes.

The Court: You will follow all of the instructions of the court, won't you?

Prospective Juror: Yes, sir.

The Court: It is your duty to follow the instructions of the court as far as the law is concerned.

Prospective Juror: Yes, sir.

The Court: And you will do that?

Prospective Juror: Yes, sir.

Mr. Henson: I will pass Mrs. Conley for cause.

Mr. Gustafson:

Q. Mrs. Conley, in answer to one of Mr. Henson's questions, you said something about the fact, well there is always, there might be room for doubt and that you want to make sure the thing was proved beyond a shadow of a doubt, something to that effect. Now, if the judge tells you as he recently has, that there is no question of the guilt of this defendant in this case, he has pleaded guilty to murder in the first degree, willful, deliberate, premeditated murder, you will accept that as a fact, will you not, and you won't question that?

[fol. 98] A. I would try to do——

Q. In other words, are you willing, if you serve as a juror, to accept as a fact that Mr. Moya did commit willful, deliberate, premeditated murder in the first degree without hearing any evidence on that whatever. This is what you're going to be required to do because he has pleaded guilty. Now will you accept that?

A. Well, I believe you still have to listen to the case or do you just——

The Court: There is no question involved here about guilty or innocent. He has already pleaded guilty, so you know there is no question about reasonable doubt about his guilt.

Prospective Juror: I see.

The Court: He has already pleaded guilty.

Prospective Juror: I see.

The Court: So you know as a matter of fact, that he has pleaded guilty, and you don't have to determine his guilt or innocence. You only have to make up your mind what you will do about it, what penalty you will inflict, life imprisonment or death. It has got to be one or the other and that is all.

Prospective Juror: Yes.

The Court: You don't have to consider whether he is guilty beyond a reasonable doubt. That has all been disposed of.

Mr. Gustafson:

Q. In other words, Mrs. Conley, with respect to that then, knowing what the Judge has just explained to you, you wouldn't go in the jury room and raise any question about [fol. 99] whether he is guilty or not?

A. No.

Q. Would you start out with the idea that he is guilty and no question about it?

A. Right.

Q. And the only question left is penalty, and on that question, since the matter is one which is solely and wholly in your exclusive judgement to determine. You wouldn't require, when the Judge tells you the law is this way, you wouldn't require me to have to prove——

A. No.

Q. —certain things before you returned the death penalty, and you wouldn't require Mr. Henson to prove certain things before you returned a life imprisonment penalty, would you?

A. No.

Q. In other words, you would listen to all of the evidence in the case based upon the evidence that you heard, and upon the fact that this defendant has pleaded guilty to and now stands convicted of first degree murder——

A. Yes, sir.

Q. —on the basis of that you would decide for yourself what you think ought to be done?

A. Yes, sir.

Q. Do you know Mr. Henson?

A. No, I don't.

[fol. 100] Q. Have you read anything in the newspapers about what he has stated——

A. No, I haven't.

Q. —concerning this case.

Pass for cause.

Mr. Henson: Mr. Holmes, I know you have been sitting there a long time——

The Court: You will take it more regular if you go at the other end.

Mr. Henson: You want me to go at the other end?

The Court: Well, that is Juror No. 7.

Mr. Henson: Yes, that is correct.

Mrs. Edmondson, is that correct?

Prospective Juror: Yes.

Mr. Henson:

Q. Are you married at the present time?

A. Divorced.

Q. Do you have any children?

A. No.

Q. And where do you live?

A. Ventura.

Q. And where do you work?

A. Point Hueneme Naval Base.

Q. In what capacity?

A. Library Assistant.

Q. Are you personally acquainted with Mr. Gustafson?

A. No.

[fol. 101] Q. Do you know any of the members of the staff?

A. No, I do not.

Q. Are you acquainted with any law enforcement officers?

A. No.

Q. Anybody in your family or anyone of your friends a law enforcement officer?

A. No.

Q. The mere fact that Mr. Gustafson here is the District Attorney and an official in the County of Ventura, is that going to cause you to pay more attention or put more weight on what he says?

A. No.

Q. And the fact that he has men like Mr. Osborne here come up and help him in the case and Mr. Henderson here to help him and we don't have anybody, is that going to influence you?

A. No.

Q. Mrs. Edmonson, do you believe that in every case of willful, deliberate and premeditated murder that the death penalty should be inflicted?

A. No.

Q. You have read, no doubt, and heard that the other two people who were charged with the murder of Olga Duncan received the death penalty, is that right?

A. Right.

[fol. 102] Q. Would the fact that Mrs. Duncan and Augustine Baldonado received the death penalty necessarily mean to you that Luis Moya should receive the death penalty?

A. No.

Q. You don't feel that maybe all ought to be treated the same or anything like that?

A. No.

Q. And I take it you have no opinion, or do you have an opinion?

A. I do have an opinion.

Q. And do you feel that you could not judge this case fairly in view of that opinion which you now have?

A. I don't think I could.

Q. No matter what the Judge instructs you, you don't feel that notwithstanding that opinion you could judge the case fairly and impartially?

A. No, I couldn't sir.

Mr. Henson: Thank you for being so honest, and I challenge this juror for cause, your Honor.

The Court: What's the cause?

Mr. Henson: The cause, she said she has an opinion.

The Court: Would that opinion influence your verdict in this case?

Prospective Juror: I think so, your Honor.

The Court: You couldn't set it aside?

Prospective Juror: I don't believe so.

[fol. 103] The Court: You don't believe so?

Prospective Juror: Possibly, but I don't believe so.

The Court: All right, challenge is allowed. You're excused. Call another name.

Mr. Henson: Thank you.

The Clerk: Julia A. Farrell, F-a-r-r-e-l-l. Mrs. Farrell, is it?

Prospective Juror: Miss Farrell.

(Prospective juror sworn by the Clerk.)

The Court: Is that Miss?
The Clerk: Did you say Mrs. or Miss?
Prospective Juror: Miss.
The Clerk: It's Miss, your Honor.
The Court: I thought so.
Miss Farrell, do you have any conscientious scruples against the death penalty in a murder case?
Prospective Juror: Yes, I do, your Honor.
Mr. Gustafson: Challenge for cause.
The Court: Very well, call another name.
Mr. Henson: Thank you, Miss Farrell.
The Clerk: Goldie I. Harral, H-a-r-r-a-l.
The Court: Miss or Mrs.?
The Clerk: Is that Mrs. Harral?
Prospective Juror: Yes.
The Clerk: Mrs., your Honor.

(Prospective juror sworn by the Clerk.)

[fol. 104] The Clerk: Be seated, Mrs. Harral, please.
The Court: Do you have any conscientious scruples against the death penalty in a murder case?
Prospective Juror: I do.
Mr. Gustafson: Challenge for cause.
The Court: You're excused. Call another name.
The Clerk: Edith J. Bush, B-u-s-h. Mrs. Bush?
Prospective Juror: Yes.
The Clerk: Mrs. Bush, your Honor.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Bush, do you have any conscientious scruples against the death penalty in a murder case?
Prospective Juror: Yes, I do.
The Court: What?
Prospective Juror: Yes.
The Court: You do?
Prospective Juror (Nods head to the affirmative.)
Mr. Gustafson: Challenge for cause.
The Court: You're excused. Call another juror.
The Clerk: Clair, that is C-l-a-i-r, M. Christensen, C-h-r-i-s-t-e-n-s-e-n.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Christensen, do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: No.

The Court: No?

[fol. 105] Prospective Juror: No.

The Court: All right, you may inquire.

Mr. Henson:

Q. Mr. Christensen, you live in Oxnard?

A. Yes.

Q. Are you acquainted with the District Attorney?

A. No.

Q. Are you acquainted with any members of his staff?

A. No.

Q. What is your occupation or business?

A. I'm an electrical engineer.

Q. Electrical engineer. For whom are you employed?

A. Navy Construction Battalion Corp., Point Hueneme.

Q. You're a civilian employee there?

A. Yes.

Q. How long have you been employed there?

A. A little over three years.

Q. Are you married, sir?

A. Yes.

Q. Do you have children?

A. No.

Q. Pardon me?

A. No.

Q. Mr. Christensen, you stated you had no conscientious objection to the death penalty, but do you believe that it should be applied in every case of willful, deliberate and premeditated murder?

[fol. 106] A. Not necessarily, I guess, in every case.

Q. Do you read the Oxnard Press Courier?

A. Yes.

Q. Have you read in the Oxnard Press Courier that the two people who were also charged with the murder of Olga Duncan, Elizabeth Duncan and Augustine Baldonado, received the death penalty?

A. Yes, I have.

Q. Would the fact that those two people received the

death penalty mean to you necessarily that this defendant should receive the death penalty too?

A. No, not necessarily.

Q. Did you read in the Oxnard Press Courier the comments of Judge Blackstock here to the jury in the Augustine Baldonado case?

A. I couldn't say for sure. I may have.

Q. Do you feel you have an opinion at this time concerning what penalty should be imposed upon this boy here?

A. Well, to a certain extent, not a final opinion.

Q. Do you feel that notwithstanding this opinion, you can fairly and impartially weigh the evidence here?

A. I believe I could.

Q. You understand that the sole duty of yours is to decide whether this man should be given life imprisonment or death?

A. I understand that.

[fol. 107] Q. You think you could—I won't repeat the question, do you still think you can act as a fair and impartial juror?

A. I believe so.

Q. Is there any reservation about it, sir?

A. I have followed the accounts in the paper to some extent, and possibly be somewhat biased.

Q. I'm sorry.

A. I might be somewhat biased, but I don't think it would affect my final judgement.

Q. Do you think even though you're somewhat biased, as you say, you could still fairly and impartially try the case depending upon the evidence?

A. I believe I could.

Mr. Henson: Pass Mr. Christensen for cause.

Mr. Gustafson:

Q. You don't know Mr. Henson, do you, Mr. Christensen?

A. No.

Q. Or his client?

A. No.

Mr. Gustafson: Pass for cause.

Mr. Henson:

Q. Mr. Robinson, where do you live?

A. Ventura.

Q. And where do you work?

A. Point Mugu Missile Range.

Q. Are you acquainted with anybody else in the jury [fol. 108] box here that works out there too?

A. No, I don't believe so.

Q. I haven't kept track. It seems like some have worked out there. You're not in the military service?

A. No, sir.

Q. And are you married, sir?

A. Yes.

Q. Do you have children?

A. Two.

Q. And what are their ages?

A. Four and five.

Q. Have you read of the Duncan murder case in the newspapers?

A. Yes, sir.

Q. What newspaper do you subscribe to?

A. The Star-Free Press.

Q. And do you remember the statement made by the District Attorney, Mr. Gustafson, here, shortly after Olga Duncan's body was discovered, concerning the—what penalty, what effect this case had upon the death penalty in California?

A. Well, I can't say I remember. I probably read it, but just what the statement was, I don't remember now.

Q. Do you have any opinion now as to what penalty should be inflicted upon this boy?

A. Yes, I have.

Q. And even though there should be evidence presented [fol. 109] in court here, notwithstanding your opinion, you could not fairly and impartially weigh the case, is that right?

A. I don't think I could.

Mr. Henson: I will challenge Mr. Robinson for cause, your Honor. He states he does have an opinion——

The Court: I heard him. You're excused. Call another name.

The Clerk: Wesley M. Smith, S-m-i-t-h.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Smith, is it?

Prospective Juror: Yes, sir.

The Court: Do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: No.

The Court: All right, take the seat there. You may inquire.

Mr. Henson:

Q. Where do you live, Mr. Smith?

A. Santa Paula.

Q. What is your occupation?

A. I'm a retired newspaper publisher.

Q. Did you publish a newspaper in Santa Paula?

A. (Nods head to the affirmative.)

Q. Do you have a family, sir?

A. A wife.

Q. And no children?

A. No.

[fol. 110] Q. How long has it been since you have been a newspaper publisher?

A. Four years.

Q. Mr. Smith, while you have no conscientious objection to the death penalty, do you feel that it should be applied in every case of willful, deliberate and premeditated murder?

A. No, I think there are certain circumstances that might alter it.

Q. You have no doubt read in the newspapers about the Olga Duncan murder case?

A. No, not too much, but some.

Q. Since you're a newspaper publisher, I wondered if you read it quite thoroughly.

A. Well, being a publisher, I don't read too much like that.

Q. Do you feel you have any opinions as to whether or not this boy should be given a life sentence or the death penalty?

A. No; I haven't made any particular definite idea on it.
Q. Have you talked to anyone concerning this case?
A. Only my wife when I had to.
Q. Pardon me?
A. Only my wife when I had to.
Q. Oh, I see, did she talk to you quite a bit about it?
[fol. 111] A. (Nods head to the affirmative.)
Q. Did she state rather definite opinions about it?

Mr. Gustafson: I object to that as incompetent, irrelevant and immaterial.

Mr. Henson: It isn't, your Honor. I think just like we went over this before,——

Mr. Gustafson: I don't care how many times we went over it, I still think it is incompetent to ask him what his wife said with respect to her opinion on this case. The only pertinent question is whether this juror has an opinion and he says already he hasn't.

The Court: Yes, but if you ask him does his wife express an opinion to him and does that cause him to form an opinion, that is a preliminary question, the objection is overruled.

Mr. Gustafson: Your Honor, he has already stated he hasn't formed any opinion.

The Court: I understand, but let him answer it again. The objection is overruled.

Mr. Henson:

Q. Has your wife expressed an opinion to you?
A. Well, she has expressed her opinion, but it doesn't affect me.
Q. How do you ever do that?
A. Well, I run my house part of the time.
[fol. 112] Q. Well, in any event, should you decide this case differently from what her opinion is, what do you think the end result is going to be at home?

Mr. Gustafson: Objected to as incompetent, irrelevant and immaterial.

The Court: Read that question, I didn't quite get it.

(Pending question read.)

Mr. Henson:

Q. Is it going to be embarrassing to you in any way?
A. No.

Mr. Henson: We will pass Mr. Smith for cause then—one more question.

Do you know the District Attorney, Mr. Gustafson?

A. Only by reputation.

The Court: Let's be quiet in the courtroom. Don't laugh about every little thing that happens.

Mr. Henson: We will pass this Mr. Smith for cause. Thank you.

Mr. Gustafson:

Q. Mr. Smith, do you know Mr. Henson?
A. No.
Q. You don't know his client, Mr. Moya?
A. No.
Q. Now, with respect to your knowledge of me by reputation, whatever you may have heard in that respect, you won't allow your feelings about me, whether they are [fol. 113] favorable or unfavorable, to influence your verdict in this case, will you?
A. No, not at all.
Q. And you will base your verdict solely upon the evidence presented in court here, and on your determination of what the proper penalty should be?
A. That is right.
Q. In that connection, I assume, Mr. Smith, that if the Judge tells you that anything that Mr. Henson says or anything that I say is not evidence, you would follow that instruction and not regard what we are saying as evidence, would you?
A. That is right.
Q. And furthermore, when it comes to the determination of the penalty, you would follow the instructions of Judge Blackstock that there is no burden on me to prove on behalf of the State that the death penalty must be applied?
A. No.
Q. And there is no burden on Mr. Henson to prove that life imprisonment should be applied, it is a matter solely

within your own judgement; you would accept that as the law, would you not?

A. Yes.

Q. Do you know of—well, let me ask you this, Mr. Smith, you wouldn't be prejudiced against either side of the case, would you, simply because I don't have a live client sitting here such as Mr. Henson has, Mr. Moya. I represent the [fol. 114] intangible entity called the People of the State of California.

A. I understand that.

Q. And merely because I don't happen to have somebody personified here as my client, you wouldn't therefore look with less favor on my side of the case for that type of law, would you?

A. I'm going by the evidence I hear.

Mr. Gustafson: Right. Pass for cause.

Mr. Henson:

Q. Mrs. Robertson, you have been sitting there a long time too. Where do you live?

A. Meiners Oaks.

Q. Are you married?

A. I'm a widow.

Q. What did Mr. Robertson do before he passed on?

A. He was a welder.

Q. Here in the County of Ventura?

A. Yes.

Q. And for whom was he employed?

A. He was employed for Max Rudolph and Continental Oil Company and various places.

Q. Do you have children?

A. Three.

Q. What are their ages?

A. Thirty-three and twenty-five and twenty-three.

Q. Mrs. Robertson, have you read about the Olga Duncan murder case in the paper?

[fol. 115] A. Oh, yes, some, I have.

Q. You have read that the two other people who were charged with the murder of Olga Duncan, namely, Elizabeth Ann Duncan and Augustine Baldonado, both received the death penalty in this case, is that right?

A. Yes, I read that.

Q. As a result of that, do you have any opinion as to what penalty should be imposed upon this boy?

A. No.

Q. Now, I notice in the—do you take the Ventura Star-Free Press?

A. No, I just read it occasionally. I'm not a subscriber.

Q. I notice recently there has been certain letters to the Editor written from people around Meiners Oaks there. Do you read any of those letters?

A. Yes, I have.

Q. Do you know the people that wrote them?

A. Quite a few of them, yes.

Q. Are those letters to the Editor going to influence your opinion in this case?

A. No.

Q. If you come to a—if you happen to think that a particular verdict is correct, is it going to embarrass you should it be different from what some other people have expressed that you know?

[fol. 116] A. No. I'm master of my own mind.

Q. Also, I recall reading in the Ventura Star-Free Press that a couple of ladies from Meiners Oaks, I think, came down to the Elizabeth Duncan trial and got here about 3:30 in the morning; did you read about that?

A. No, I didn't. If I did, I didn't remember it.

Q. Did you attend the Elizabeth Duncan trial?

A. No, indeed.

Q. Do you know anybody that did?

A. No, none of my friends did.

Q. Did any of your friends serve as jurors on the Elizabeth Duncan case?

A. No, they didn't.

Q. Any of them serve as jurors in the Augustine Baldonado case?

A. No.

Q. Your son—let's say, you had a son twenty years of age, and being in the same position here as this boy, would you be willing to have twelve people in the same frame of mind that you're now in hearing that case?

A. I would.

Mr. Henson: We will pass Mrs. Robertson for cause.

Prospective Juror: Your Honor, I'm a little hard of hearing, and while I don't like to admit it, yet a man's life hangs on whether I hear or not, I think you should know that.

The Court: Well, you can hear me now, can't you?

[fol. 117] A. Yes. I have heard surprisingly well today. I didn't—you know.

The Court: Well, you heard Mr. Henson all right.

Prospective Juror: Yes, I have.

The Court: I don't think you will have any trouble. What do you think Mr. District Attorney?

Mr. Gustafson: Pardon?

The Court: She says she is a little hard of hearing. She doesn't appear to be very hard of hearing.

Mr. Gustafson: Well, on the other hand, she says she is somewhat concerned about whether she will hear the evidence here, and this being a very important matter, I certainly wouldn't want her to feel compelled to serve if she is afraid she might not hear some of the evidence.

Prospective Juror: That would bother me very much.

The Court: How is that?

Prospective Juror: That would bother me very much.

The Court: Mr. Henson, do you want to stipulate that she may be excused?

Mr. Henson: Yes, I will.

Mr. Gustafson: So stipulated, your Honor.

The Court: All right, you're excused. Call another juror.

The Clerk. Thomas G. Benbrook, B-e-n-b-r-o-o-k.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Benbrook, do you have any conscientious [fol. 118] scruples against the infliction of the death penalty in a murder case?

Prospective Juror: No.

The Court: All right, have that seat.

Mr. Henson:

Q. You live in Ventura, Mr. Benbrook?

Y. Yes.

Q. Are you married?

A. No.

Q. What is your occupation?

A. Service station attendant.

Q. And where are you employed?

A. The Main Street Service Station in Ventura.

Q. Are you acquainted with Mr. Gustafson, the District Attorney?

A. No.

Q. Are you acquainted with Mr. Henderson?

A. No.

Q. This man seated right here?

A. No, I don't believe so.

Q. Are you acquainted with any members of the District Attorney's staff?

A. No, not to my knowledge.

Q. You have read about this Olga Duncan case in the newspapers, have you not?

A. Yes.

Q. You know, at least you have read, that the two other [fol. 119] people charged with the murder of Olga Duncan received the death penalty, is that right?

A. Yes.

Q. Do you read the Ventura Star-Free Press?

A. Yes.

Q. Do you recall reading the comments of the District Attorney here concerning the death penalty along last December when this case started?

A. I seem to remember something, but I don't remember exactly what it was.

Q. You have talked to people about this case, have you?

A. Yes.

Q. In the service station there, do you talk to people that come in?

A. Yes.

Q. Do you have an opinion as to what penalty should be imposed upon this defendant?

A. Yes, I do.

Q. And do you feel that you could not act as a fair and impartial juror because of that opinion?

A. I'm afraid it would still be in my mind.

Q. And even though you would hear the evidence and try to decide, your opinion would still influence your decision?

A. I'm afraid it would still be there, yes.

Mr. Henson: I challenge this juror for cause, your [fol. 120] Honor.

Mr. Gustafson: Your Honor, I resist the challenge. I would like to inquire of this juror.

Q. Mr. Benbrook, you do have an opinion based on what you have read and heard outside this courtroom —

A. Yes.

Q. — as to what the penalty for Mr. Moya would be. Nobody is asking you to get rid of an opinion, because you can't, we only want to know whether, notwithstanding that opinion; in other words, you still have it, but notwithstanding it, you can sit as a juror here and listen to the evidence in this case and then base your decision on the evidence that you hear together with the fact that the defendant has pleaded guilty to murder in the first degree. Now, knowing that that is all that you are required to do, do you think that in the light of that you could, notwithstanding your opinion, give a fair and impartial trial to Mr. Moya on the issue of what his penalty should be?

A. I don't believe I could.

Q. You don't?

A. No, sir.

The Court: All right, the challenge is allowed, you're excused.

Mr. Henson: Thank you, Mr. Benbrook, you're excused.

The Court: Call another name.

The Clerk: Rebecca A. Currier, C-u-r-r-i-e-r. Is it Mrs. [fol. 121] Currier?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Currier, do you live in Simi?

Prospective Juror: Yes, I do.

The Court: Do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: I do.

The Court: Yes.

Mr. Gustafson: Challenge for cause.

The Court: All right, call another name.

The Clerk: John F. Miller, M-i-l-l-e-r.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Miller, do you live in Moorpark?

Prospective Juror: Yes, sir.

The Court: Do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: All right, have that seat.

Mr. Henson:

Q. Mr. Miller, what is your occupation?

A. I'm a warehouse man.

Q. A warehouse man?

A. Yes, sir.

Q. For whom are you employed?

A. Self-employed.

Q. Do you own your own warehouse?

[fol. 122] A. Co-owner.

Q. I see. In Moorpark?

A. Yes, sir.

Q. Do you have a family, sir?

A. Yes, sir.

Q. And how many children do you have?

A. Five.

Q. Five. What are their ages?

A. 23, 21, 19, and 11.

Q. Are you acquainted with the District Attorney, Mr. Gustafson?

A. Not personally.

Q. By reputation?

A. Yes, sir.

Q. Is that reputation, whatever it may be, going to affect your verdict in this case?

A. No, sir.

Q. Are you acquainted with any of the members of the District Attorney's staff?

A. (No response by the juror.)

Q. While you have no conscientious objection to the death penalty, Mr. Miller, do you feel that it should be applied in every case of willful, deliberate and premeditated murder?

A. No, I don't.

Q. What paper do you subscribe to, besides maybe the Moorpark Enterprise?

[fol. 123] A. Ventura.

Q. Ventura Star-Free Press?

A. Yes.

Q. You have read in that paper no doubt the fact that the other people who were charged with the murder of Olga Duncan, namely Elizabeth Duncan and Augustine Baldonado, received the death penalty?

A. Yes, sir.

Q. The fact that those people have received the death penalty, is that going to cause you to believe that this defendant should receive the death penalty too?

A. No, not necessarily.

Q. Do you feel you have any opinion about what penalty should be imposed upon this boy?

A. No.

Q. Any members of your family connected with law enforcement?

A. No.

Q. Any members of your family been the victims of a crime of violence?

A. No.

Q. Any of your friends or acquaintances or relatives served as jurors in the case of Elizabeth Duncan and Augustine Baldonado?

A. No.

Q. And if one of your—if you had a twenty-year-old [fol. 124] son, and he were on trial in the same situation as this boy is, would you be willing to have twelve people in the frame of mind that you're now in hearing that case and deciding whether he should live or die?

A. Yes.

Mr. Henson: We will pass Mr. Miller for cause.

Mr. Gustafson:

Q. Do you know Mr. Henson, Mr. Miller?

A. No, I don't.

Mr. Gustafson: Pass for cause.

Mr. Henson: Mr. Casey, is that it?

Prospective Juror: Yes.

Mr. Henson:

Q. Where do you live, sir?
A. Oxnard.
Q. And what is your business or occupation?
A. I'm a mathematician.
Q. A mathematician?
A. Yes.
Q. And for whom are you employed?
A. Pacific Missile Range.
Q. Pacific Missile Range?
A. Yes, sir.
Q. And is that at Point Mugu?
A. Yes.
Q. Do you have a family, sir?
A. Yes.
[fol. 125] Q. How many children?
A. Two.
Q. And their ages?
A. Three and a year and a half.
Q. Three and a year and a half?
A. Yes.
Q. Are you acquainted with the District Attorney, Mr. Gustafson?
A. No.
Q. Are you acquainted with any of the members of his staff?
A. Not to my knowledge.
Q. You read the Oxnard Press Courier?
A. No, I do not.
Q. You do not?
A. No.
Q. What paper do you read?
A. The Star-Free Press.
Q. Pardon me?
A. The Star-Free Press.
Q. But you live in Oxnard?
A. Right.
Q. And you have heard, you have read a lot about this case?
A. I have read about it, yes.
Q. Do you have an opinion now based upon what you

[fol. 126] have read as to what penalty should be imposed upon this boy?

A. No.

Q. Do you know of any reason whatsoever why you shouldn't serve as a juror in this case?

A. No.

Q. Do you feel the death penalty should be imposed in every case of willful, deliberate and premeditated murder?

A. Not every case.

Mr. Henson: We will pass Mr. Casey for cause.

Mr. Gustafson:

Q. You don't know Mr. Henson, do you? Mr. Casey?

A. No.

Mr. Gustafson: Pass for cause, no questions.

The Court: All right, go ahead.

Mr. Henson: Your Honor, I was just wondering. We have been going for two hours now. Did you want to call a recess now. One hour? Oh, I'm sorry, I'm way ahead of you.

The Court: We take our recess at 3:00 o'clock. We have only been going one hour.

Mr. Henson: I'm sorry.

Q. Mr. Keyes—Mr. Roe, excuse me, where do you live, sir?

A. Oxnard.

Q. And where do you work?

A. I work for the Naval Civil Engineering Laboratory, Point Hueneme.

[fol. 127] Q. Do you have a wife and family, sir?

A. A wife.

Q. No children?

A. No.

Q. Do you feel that the death penalty should be applied in every case of willful, deliberate and premeditated murder?

A. Yes, I do.

Q. No matter what the facts are, you still feel that every person who commits willful, deliberate, premeditated murder should suffer the death penalty, is that right?

A. That is right.

Q. And even if the Judge should instruct you that you have discretion in this case, you would still feel that every person who commits willful, deliberate, premeditated murder should suffer the death penalty?

A. In that case, yes, I do.

Mr. Henson: I challenge this juror for cause.

Mr. Gustafson: I would like to examine this juror.

The Court: All right.

Mr. Gustafson:

Q. Mr. Roe, if you served as a juror in this case, would you be willing to accept from Judge Blackstock the law of this state and to follow the laws as Judge Blackstock states it to you?

A. Certainly.

Q. And so in the event that the law were to say, as it [fol. 128] does say in California that, for example, a seventeen-year-old boy who commits willful, deliberate and premeditated murder cannot be executed, the death penalty does not apply to somebody under eighteen years of age, you would follow that law, would you not?

A. I certainly would.

Q. Even though, regardless of whether or not you agreed with the law as being good or bad, is that right?

A. Yes.

Q. Now, if Judge Blackstock tells you that in a case of this nature, the facts standing alone, in and of itself, that a person committed first degree murder does not automatically require the death penalty, but the determination of whether the penalty of death should be applied rests wholly in the discretion of the jury, would you, if you sat on a jury, take that law from Judge Blackstock and exercise your discretion?

A. Perhaps; I am afraid I would be somewhat biased, as where the law gives you two alternatives here, the other law does not, applies to someone under eighteen.

Q. Yes, but if the law gives you two alternatives and says that your selection of the penalty, based upon what you hear in court as to the background and history or anything else concerning this defendant, together with the fact that

he has admitted and pleaded guilty to and stands convicted of murder in the first degree, the law says that your selection of that penalty, whether it is life or death, is absolute [fol. 129] and may be based on any consideration whatever which you glean from the evidence, you would be able to follow that sort of an instruction, would you not?

A. Yes.

Q. And therefore, unless you found something in the evidence or from the crime with which this man stands convicted to persuade you that the death penalty was the proper penalty, you wouldn't vote it, would you?

A. I'm not sure that I agree with you. I think since it was premeditated, I think I would be biased against the defendant for that particular reason.

Q. Well, biased in the sense you would close your mind to any possible penalty other than the death penalty, or simply biased as in the sense that anybody is biased against a person who willfully and deliberately and premeditatedly kills another, in which sense is it?

A. In the latter sense.

Q. All right, and not in the sense, the former sense that I stated. Well, then if that is the basis, only that you're biased against somebody who does that, of course, the law feels that way, that a person who does that must be punished, and therefore we are here and you are here for only one purpose, namely, to determine whether that punishment shall be death or life imprisonment. Now, accepting that as the fact, and you would accept the fact that he is guilty of first degree murder, would you not?

[fol. 130] A. Correct.

Q. Could you not, with an open mind, listen to whatever evidence is presented and base your determination of what the penalty should be on the basis of what you hear, together with the fact that he is convicted of first degree murder.

A. Only if very extenuating evidence was presented to convince me it were true. If the facts existed that he could —that there were some extenuating circumstances that would prove that this could be considered, but otherwise I don't believe so.

Q. And if the Judge tells you that I don't have to prove that there are aggravating circumstances which compel you

to impose the death penalty, and Mr. Henson doesn't have to prove that there are extenuating circumstances which should relieve him of the death penalty, in as a matter of fact, that the law doesn't require either extenuating or aggravating circumstances for the death or for life imprisonment penalty, would you follow that instruction?

A. Yes.

Mr. Gustafson: I resist the challenge, your Honor.

The Court: Let's see, your name is Roul is it?

Prospective Juror: Roe.

The Court: Roe?

Prospective Juror: Yes.

The Court: Well, after everything you have heard now, are you still of the opinion that every person convicted of [fol. 131] willful, deliberate, premeditated murder should get the death penalty?

Prospective Juror: I still believe if it is premeditated, yes.

The Court: They should have the death penalty?

Prospective Juror: Yes, sir.

The Court: So in this case, if you should serve on the jury and you knew, which you must know now because I'm telling you, that any jury that we have here must either inflict the death penalty or life imprisonment, one or the other, they have that discretion and it's apparently an absolute discretion——

Prospective Juror: Yes, sir.

The Court: Now, would you exercise the discretion in favor of the death penalty because of your belief that everyone convicted of murder in the first degree, that is a willful, deliberate, premeditated murder, should receive the death penalty?

Prospective Juror: I'm afraid I would be biased in that direction, sir.

The Court: The challenge is allowed. You may be excused.

The Clerk: Orville D. Hernvall, H-e-r-n-v-a-l-l, Hernvall.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Hernvall, do you have any conscientious scruples against the death penalty in a murder case?

[fol. 132] A. No, I don't.

The Court: All right, have that seat.

Mr. Henson:

Q. You live in Ventura, Mr. Hernvall?

A. I live in Oak View.

Q. Oak View; and your occupation is what, sir?

A. Title Insurance and Trust Company.

Q. What is your position with that company?

A. I'm classified as a searcher.

Q. A searcher?

A. Yes.

Q. Does that require you to spend a great deal of time here at the Recorder's office in the courthouse?

A. We have copies of the records of the Recorder's office, which I spend time with at our office.

Q. At your office, but not here?

A. Yes.

Q. Are you acquainted with Mr. Gustafson, the District Attorney?

A. Only by name.

Q. How about any other members of his staff?

A. Just by name.

Q. By name?

A. Yes, sir.

The Court: Speak up a little louder, would you?

Mr. Henson:

Q. Are you married, Mr. Hernvall

A. Yes, I am.

[fol. 133] Q. Do you have children?

A. One.

Q. One child. You do read the Ventura Star-Free Press, do you?

A. Yes, I do.

Q. You have read about this Olga Duncan murder case?

A. Yes.

Q. And have you heard about it on television news broadcasts?

A. Yes.

Q. And radio broadcasts?

A. Somewhat, yes.

Q. Have you discussed the case with people?

A. Yes.

Q. As a result of hearing about the case and discussing the case, do you feel you have an opinion as to——

A. I have none.

Q. —as to what——

A. I have none.

Q. Do you feel that the death penalty should be inflicted in every case of willful, deliberate and premeditated murder?

A. No, I do not.

Q. Do you feel that simply because the two other persons charged with the murder of Olga Duncan received the death penalty, that this boy should also receive the death penalty [fol. 134] A. No, I do not.

Q. Do you know of any reason why you couldn't serve as a fair and impartial juror in this case?

A. No.

Q. If you, yourself, were on trial here in the same position as this defendant is, and having a jury decide whether you should get life imprisonment or death, would you be willing to have twelve people in the same frame of mind that you are now in hearing the case?

A. Yes, I would.

Q. Have you ever sat as a criminal juror before, a trial juror in a criminal case?

A. No, I have not.

Q. Any persons in your family or any of your close friends police officers?

A. No.

Q. If you should serve as a juror in this case, and after hearing all of the evidence and hearing the argument and hearing the Judge instruct you on the law and retire to the jury room with your fellow jurors to deliberate, would you freely and openly discuss the evidence with your fellow jurors?

A. Evidence presented, yes.

Q. Now, supposing all eleven of the other jurors besides yourself felt a certain way and had a certain opinion about the case, what disposition should be made, and you had a contrary opinion, that is one side was for life, the other side

[fol. 135] was for death, would you change your one vote merely because all of the other eleven had voted opposite to you?

A. I would reconsider the evidence as I saw it, yes.

Q. And if the evidence still didn't convince you that they were right, would you still maintain your original vote?

A. Well, apparently I saw it wrong, if that is the case. I think I would change my vote?

Q. You would think you had seen it wrong and just change your vote because all of the other eleven had voted differently, is that it?

A. No, because I had interpreted the law wrong or some phase of the evidence wrong.

The Court: You will be instructed that it's your duty to adhere to your own opinion as long as you really have that opinion. If your convinced by your co-jurors that your opinion is wrong, then you should change it; you understand?

Prospective Juror: Yes, sir.

The Court: And that is what you would do, is it?

Prospective Juror: All right.

Mr. Henson: We will pass Mr. Hernvall.

Mr. Gustafson:

Q. Mr. Hernvall, with respect to your opinion on the death penalty, I believe you told Mr. Henson that you wouldn't necessarily impose it simply because the defendant is guilty of murder in the first degree, but let me ask you [fol. 136] this, you wouldn't require me to prove any particular set of circumstances before you impose the death penalty, would you, if the Judge tells you that I have no burden of proof whatever?

A. No, I wouldn't.

Q. In other words, you're convinced that the death penalty of the two possible penalties is the proper one from what you hear in the evidence, then you will have no hesitancy in voting for a verdict which fixes the penalty of death, would you?

A. That is correct, yes, sir.

Q. And you wouldn't be of the frame of mind as you sit here in the jury box listening to the evidence or as you go into the jury room to deliberate, that automatically you're

going to vote for life imprisonment as a penalty unless I prove certain things?

A. No.

Q. And you will then accept the Judge's instruction to you with respect to the law that I am not required to prove any particular thing in order to get you to vote for the death penalty, nor is Mr. Henson required to prove to you any particular thing in order to get you to vote for life imprisonment——

A. Yes, sir.

Q. That decision in which the penalty should be inflicted, is one that is solely yours based on the crime of which the defendant now stands convicted plus any other evidence [fol. 137] that might be produced?

A. Yes, sir.

Q. And that there is no obligation on me and there is no obligation on Mr. Henson, either one, to produce any evidence here.

Mr. Henson: Your Honor, I'm going to object to this. I haven't so far, but it seems to me that the District Attorney is trying to pre-instruct the juror on the law by that last question.

Mr. Gustafson: I think it's in the same fashion as Mr. Henson has heretofore asked?

The Court: I think his question is predicated upon a condition, if the Court instructs the jury so and so.

Mr. Gustafson: Well, I'll pass Mr.——

The Court: The jury is bound by the instructions of the Court so far as the law is concerned. Is there anyone on this prospective jury who could not follow the instructions of the Court relative to the law of the case? If there is, hold up your hand. I think they understand their duty all right in this regard.

Mr. Gustafson:

Q. Do you know Mr. Henson, Mr. Hernvall?

A. Only by name.

Q. And you don't know his client, Mr. Moya?

A. No.

Q. Is there any reason you could think of why you might [fol. 138] be prejudiced or biased against my side of the

case; the plaintiff is the People of the State of California in this matter.

A. No, none whatsoever.

Q. And the mere fact, Mr. Hernvall, that I don't happen to have a living person sitting here as the client whom I represent, but I represent the intangible entity called the People of the State of California, wouldn't cause you to give less attention to my side of the case, would it?

A. No, I understand that.

Mr. Gustafson: Thank you. Pass for cause.

The Court: All right. Now it's three o'clock. The court will take a brief recess.

You're excused until the Bailiff calls you.

(Recess.)

The Court: The jury are all present, go ahead.

Mr. Henson:

Q. Mr. Holmes, we have finally gotten to you now, and your occupation again, sir, is what?

A. I'm general manager of Southern Pacific Milling Company.

Q. You live in Ventura?

A. Ventura.

Q. Do you have a family, sir?

A. I have one daughter, sixteen.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No.

[fol. 139] Q. Do you know any of the members of his staff?

A. I don't believe so.

Q. Do you know Mr. Henderson, the man seated here?

A. I may have met him sometime. I couldn't say for sure.

Q. How about Mr. Osborne?

A. I don't believe so.

Q. The fact that the District Attorney has officers sitting behind him here to assist him and we don't, is that going to influence your decision in this case?

A. Not in the least.

Q. The fact that the defendant is sitting here with Deputy

Sheriffs in back of him and on the side of him, is that going to affect your decision?

A. No.

Q. Any member of your family or any friend of yours connected with law enforcement?

A. No.

Q. By the way, did you know Mr. Varela and who's wife——

A. Yes.

Q. Did you ever talk to him about the case?

A. No.

Q. Anyone in your family or anyone, a friend of yours, been a victim of any crime of violence?

A. No.

[fol. 140] Q. Do you feel that the death penalty should be inflicted in every case of willful, deliberate and premeditated murder?

A. I do.

Q. Even though the Judge should instruct you that in a first degree murder case you have discretion to either give life or death, the mere fact that it is a willful, deliberate, premeditated murder would cause you in and of itself to give the death penalty?

A. No matter what the instructions were, it wouldn't change my own belief. I would be willing to follow the instructions, but it wouldn't change my basic thinking.

Q. I see, so that if, as the Judge has already informed you, this defendant has pleaded guilty to willful, deliberate and premeditated murder, you would have an opinion that he should be given the death penalty now?

A. That is correct.

Q. And even though the Judge, if the Judge should instruct you say you think this individual opinion of yours would cause you to vote for the death penalty anyway?

A. That is my personal feeling, yes.

Mr. Henson: I challenge this juror, your Honor.

The Court: Are you resisting the challenge?

Mr. Gustafson: Yes, your Honor.

The Court: What?

Mr. Gustafson: Yes, I am.

[fol. 141] Q. Mr. Holmes, with respect to this matter of penalty, even though you feel that the penalty for any willful, deliberate and premeditated murder should be death, you will accept the law as stated to you by Judge Blackstock, will you not, that in California it is not automatically death, but is a matter of choice for the jurors to decide.

A. Right.

Q. And in that respect, if the Judge tells you that your choice of verdict must be a meaningful one, based upon not only the crime of which the defendant stands convicted, but also any other evidence which may be offered either by the prosecutor or the defendant concerning Mr. Moya's background and history and so forth, then you would, would you not, make your verdict a meaningful one based upon the crime of which he was convicted and the evidence that you hear?

A. Yes, as I told Mr. Henson, though it still doesn't change my basic thinking.

Q. No, it doesn't change your basic thinking about what the law should be in that respect, but you would accept the law as it is nevertheless, would you not?

A. I would accept the Judge's instructions, yes.

Q. So when he tells you that the death penalty is not automatic in a first degree murder case, but is one of two possible penalties, and that your verdict must be a meaningful one based upon the evidence presented along with the crime of which the defendant stands convicted, you [fol. 142] would follow that instruction, would you not?

A. Yes.

Q. And you would in fact exercise your discretion then in selecting which of the two penalties should apply, would you not?

A. Yes.

Mr. Henson: May I ask a few questions?

Q. Mr. Holmes, though, even though you do follow the instructions of the Court, do you feel you could act fairly and impartially with this opinion that you have that every person convicted of willful, deliberate and premeditated murder should be given the death penalty?

A. No, I do not.

Mr. Henson: I renew my challenge.

The Court: The challenge is allowed. You're excused. Call another name.

The Clerk: Alice M. Petrou, P-e-t-r-o-u.

The Court: Miss or Mrs.?

Prospective Juror: Mrs.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Petrou, do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: No.

The Court: All right, have that seat. Go ahead.

Mr. Henson:

Q. Mrs. Petrou, are you married—yes, you are married.

[fol. 143] Q. Do you have a family?

A. No.

Q. No family. Is your husband employed?

A. Yes.

Q. Where does he work?

A. Elks Club in Oxnard.

Q. The Elks Club in Oxnard?

A. Yes.

Q. What is his position at the Elks Club?

A. Bartender.

Q. Bartender. Do you know the District Attorney, Mr. Gustafson?

A. No.

Q. Has your husband ever spoken about Mr. Gustafson at the Elks Club in Oxnard?

A. No.

Q. Do you subscribe or do you read the Oxnard Press Courier?

A. Yes.

Q. Did you read in the Oxnard Press Courier about Augustine Baldonado getting the death penalty for the murder of Olga Duncan?

A. Yes.

Q. Did you read the comments of Judge Blackstock?

A. Not to my knowledge. Not that I remember.

Q. Have you discussed this case with your husband and

[fol. 144] with other people?

A. Slightly.

Q. Do you feel as Mr. Holmes felt, that in every willful, deliberate and premeditated murder that the death penalty should be inflicted?

A. Is the question, do I feel that it should?

Q. Do you feel that way?

A. No.

Q. You don't. Do you feel that the fact—you have heard that Elizabeth Duncan also got the death penalty, have you not?

A. Yes.

Q. And the fact that both Mrs. Duncan and Augustine Baldonado got the death penalty for the murder of Olga Duncan that this boy here should also get the death penalty?

A. Not necessarily.

Q. Is anyone in your family or relative a police officer or——

A. No.

Q. —or law enforcement?

A. No.

Q. Do you work, yourself?

A. No.

Q. Do you feel you have any opinion whatsoever about what penalty should be imposed upon this boy?

A. Not definitely. I would have to hear—I would have [fol. 145] to hear farther. Not definitely, no.

Q. Any of your friends serve as jurors in the cases of Elizabeth Duncan or Augustine Baldonado?

A. No.

Q. The fact that Mr. Gustafson here has a title as District Attorney, would that cause you to put any more weight upon what he says than what I might say?

A. No.

Q. The fact that he has officers sitting behind him to assist him on the case going to affect your judgment in any way?

A. No.

Q. Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

A. No, I don't.

Q. Do you understand that this is a penalty trial——

A. Yes.

Q. —to determine whether this boy should be given a life imprisonment or death?

A. Yes.

Q. Is there anything about the Duncan case, whatsoever, that might cause you to not be fair and impartial?

A. No.

Q. If it should occur, should appear, that the victim in this case, Olga Duncan, was a pregnant woman, would that cause you to be prejudiced against this defendant?

A. No.

[fol. 146] Mr. Henson: Pass Mrs. Petrou—Petrou for cause.

Mr. Gustafson: No questions. Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: The jury is satisfactory to me, your Honor.

Mr. Henson: The defendant will excuse Mr. Sonderup. Thank you so much, sir.

(Juror No. One excused.)

The Clerk: Annette, A-n-n-e-t-t-e Stearns, S-t-e-a-r-n-s. Mrs. Stearns?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Stearns, do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: Yes, I do.

Mr. Gustafson: Challenge for cause.

Mr. Henson: Thank you Mrs. Stearns.

The Court: Call another name.

The Clerk: Mrs. Helen D. Wanamaker, W-a-n-a-m-a-k-e-r.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Wanamaker, do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: Yes, I do.

The Court: You do?

Prospective Juror: Yes.

Mr. Gustafson: Challenge for cause.

[fol. 147] The Court: You're excused.

The Clerk: Lucy S. Thiel, T-h-i-e-l, Mrs. Thiel.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Thiel, do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: No.

The Court: All right, have that seat. Go ahead. You may inquire.

Mr. Henson:

Q. Mrs. Thiel, are you married?

A. Yes.

Q. Do you have a family?

A. Yes.

Q. How many children do you have?

A. Two.

Q. What are their ages?

A. Twenty-three and thirty.

Q. What does Mr. Thiel do?

A. He is the Secretary-Manager of the Oxnard Elks Club.

Q. Are you personally acquainted with Mr. Gustafson?

A. Well, no, not personally.

Q. Have you spoken to him, have you?

A. A nodding acquaintance, yes.

Q. Do you feel that in every case of willful, deliberate, premeditated murder that the death penalty should be inflicted?

[fol. 148] A. Circumstances alter the case.

Q. You don't have an opinion, then, that every case of willful, deliberate and premeditated murder should be punishable by the death penalty, then?

A. Well, as I say, I think circumstances alter the case.

The Court: Well, in other words, you do not have an opinion to the effect that every——

Prospective Juror: No.

The Court:—premeditated murder, willful, deliberate and premeditated murder, should have the death penalty, do you? Not every one, depends upon the circumstances, isn't that what you say?

Prospective Juror: Yes.

Mr. Henson:

Q. Do you read the Oxnard Press Courier?

A. Yes.

Q. Do you recall when the body of Olga Duncan was first discovered, reading about that in the paper?

A. Yes.

Q. Do you recall a statement issued by the District Attorney, here, concerning how this case affects the death penalty in California?

A. No, I don't recall that.

Q. You have read in the Oxnard Press Courier that Elizabeth Duncan was sentenced to death?

A. Yes.

[fol. 149] Q. And you have read, have you not, that Augustine Baldonado was sentenced to death?

A. Yes.

Q. In the article concerning the death sentences given Baldonado, did you read the comments of Judge Blackstock?

A. No, I didn't.

Q. Do you feel you have any opinion about what penalty should be imposed on this boy based upon what you have read and heard about the case?

A. Well, I have an opinion, but—yes, I have an opinion.

Q. Do you feel that that opinion would cause you to be unfair?

A. I wouldn't be biased, no. I would listen to——

Q. Would it take some evidence——

A. No.

Q. — to change that opinion?

A. You have already given the evidence. You mean just to the penalty?

Q. Yes.

A. Well, I wouldn't think evidence, no.

Q. You understand there is no question of guilt in this case so far as this defendant is concerned?

A. That is right.

Q. But I'm not quite clear as to whether or not you have an opinion concerning what penalty should be imposed upon this man?

[fol. 150] A. Well, what I'm trying to say is I have an opinion, yes, but my mind is open. I could listen to others.

Q. Have other people expressed opinions to you as to what penalty should be imposed?

A. I have heard people talk, yes.

Q. And do you feel that those opinions might affect you as you deliberate?

A. Oh, no, no. You mean the outside——

Q. Yes.

A. No.

Q. Do you think that it would be embarrassing to you?

A. No, no.

Q. —that is if you came about a verdict different from what other people have——

A. No, no.

Q. In the event that you are selected as a trial juror, and after deliberation all of the other eleven jurors feel a certain way, that a certain punishment should be inflicted, and you feel the other way, would you change your opinion merely because there were eleven against you?

A. Well, not if I thought I were right and they were wrong; I would be willing to listen and be convinced, but I mean I wouldn't hold out just to be holding out for the other way. I wouldn't be stubborn, if that's what you mean.

Q. I mean, would you just throw in the towel, so to speak [fol. 151] just to go along?

A. [redacted] I wouldn't give up if I thought I was right.

Q. The fact that this boy is of Mexican descent, would that cause you to be——

A. No.

Q. —biased against him?

A. No.

Q. Do you know any of the members of the District Attorney's staff?

A. No, not to my knowledge. I don't know who the staff is.

Q. Pardon me?

A. I don't know who the staff is.

Q. Well, do you know Mr. Henderson seated here; this man right here?

A. No.

Q. Mr. Osborne?

A. I know the name, but I don't know him?

Q. You know the name. If you had a son twenty years

old in a trial similar as this, where the jury was to select whether he should live, be given life imprisonment or death, would you be willing to have twelve people in the same frame of mind that you are now in hearing the case?

A. Yes.

Mr. Henson: Pass Mrs. Thiel for cause.

[fol. 152] Mr. Gustafson: No questions, pass for cause.

The Court: All right. The peremptory is now with the People.

Mr. Gustafson: I accept the jury as now constituted.

Mr. Henson: The defendant will excuse Mr. Germann. Thank you.

(Juror No. Three excused.)

The Clerk: August C. Fowler, F-o-w-l-e-r.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Fowler, do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: Yes, I do.

Mr. Gustafson: Challenge for cause.

The Court: You're excused. Call another name.

The Clerk: Jerry M. Comstock, C-o-m-s-t-o-c-k.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Comstock, do you have any conscientious scruples against inflicting the death penalty in a murder case?

Prospective Juror: No, sir, I do not.

The Court: All right, have that seat.

Mr. Henson:

Q. Mr. Comstock, are you married, sir?

A. I am not.

Q. Where do you work?

A. At the Pacific Missile Range, Point Mugu.

Q. Are you acquainted with any of the other jurors here that also work out there?

[fol. 153] A. I have met Mrs. Weidemann, next to me here.

Q. I'm sorry?

A. I have met Mrs. Weidemann, next to me here.

Q. Would the fact that this boy is of Mexican descent going to influence your decision in this case?

A. Not at all.

Q. Do you read the Oxnard Press Courier?

A. Yes, sir.

Q. Have you read about the Olga Duncan murder case in the Oxnard Press Courier?

A. Yes, sir.

Q. Have you read about it in other papers?

A. I don't believe so.

Q. Have you heard about it on the radio?

A. Some, not very much.

Q. Have you heard about it on television news broadcasts.

A. Some, not very much.

Q. Have you talked to persons about the case?

A. Some, yes.

Q. Do you feel you have any opinion now as to what penalty should be imposed upon this boy?

A. No, sir, I do not.

Q. You are aware that Elizabeth Duncan and Augustine Baldonado both received the death penalty for the murder of Olga Duncan, are you not?

[fol. 154] A. Yes, I am.

Q. Would that fact cause you to be of the opinion or feel that this defendant should also get the death penalty?

A. No, sir.

Q. Do you think the death penalty should be inflicted in every case of willful, deliberate and premeditated murder?

A. No, sir, I do not.

Q. Is any member of your family or anyone near to you been a victim of a crime of violence?

A. No, sir.

Q. Do you know the District Attorney, here, Mr. Gustafson?

A. No, sir.

Q. Do you know any members of his staff?

A. No.

Q. Do you know any reason whatsoever why you couldn't be a fair and impartial juror?

A. No, I don't.

Mr. Henson: Pass Mr. Comstock for cause.

Mr. Gustafson:

Q. Mr. Comstock, you don't know Mr. Henson, do you?
A. No, sir.
Q. And with respect to the penalty to be accessed in this case against the defendant, you haven't any preconceived notion that automatically it should be life imprisonment unless I prove some particular thing to you, do you?
[fol. 155] A. No, I don't.

Mr. Gustafson: Pass for cause.
The Court: All right, the peremptory is now with the People.
Mr. Gustafson: I accept the jury as now constituted.
The Court: The peremptory is with the defendant.
Mr. Henson: The defendant will excuse Mrs. Weidemann. Thank you so much.
The Clerk: Mrs. Sabrine, S-a-b-r-i-n-e Finnerty, F-i-n-n-e-r-t-y.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Finnerty, do you have any conscientious scruples against the death penalty in a murder case?
Prospective Juror: No, sir.
The Court: All right, have that seat.

Mr. Henson:

Q. Mrs. Finnerty, you're married and have a family, do you?
A. Yes, sir.
Q. How many children do you have?
A. Two.
Q. And what are their ages?
A. Fifteen and twelve.
Q. Are you acquainted with the District Attorney, Mr. Gustafson?
A. No, sir.
Q. Are you acquainted with any members of his staff?
[fol. 156] A. No, sir.
Q. Have you ever served as a trial juror in a criminal case before?

A. No, sir.

Q. Has anyone near to you been a police officer?

A. No, sir.

Q. What paper do you read out in Fillmore, their daily paper?

A. Ventura.

Q. The Ventura Star-Free Press?

A. Yes.

Q. And have you read all of the accounts or the majority of the accounts of the Olga Duncan murder case?

A. I would say the majority, yes.

Q. Did you hear any television broadcasts concerning the case?

A. Quite a few.

Q. And have you discussed the case with various people?

A. Well, with my family and a few people, yes.

Q. Have you read that Elizabeth Duncan and Augustine Baldonado both received the death penalty for the murder of Olga Duncan?

A. Yes.

Q. Do you feel you have any opinion concerning what penalty should be imposed upon this boy?

[fol. 157] A. No, sir.

Q. Do you feel that in every willful, deliberate and premeditated murder that the death penalty should be inflicted?

A. No, sir.

Q. Do you feel that just because the other two people were sentenced to death for the murder of Olga Duncan, that this boy should be also sentenced to death?

A. No, sir.

Mr. Henson: We will pass Mrs. Finnerty for cause.

Mr. Gustafson:

Q. Mrs. Finnerty, do you know of any reason why you couldn't give a fair and impartial trial to my side of the case, the People of the State of California?

A. No, sir.

Q. You don't have any preconceived idea that in a case of this kind you would automatically impose the penalty of

life imprisonment unless I proved to you certain things that you might have in your mind?

A. Would you repeat that, please.

Q. Yes. I want to know whether you have any idea now that you would automatically impose the penalty of life imprisonment unless I produce certain proof in your mind as to facts which would—without which you would not impose the death penalty? I still think that isn't very clear.

A. No, it isn't.

Q. I will try to restate it; in other words, what I want to [fol. 158] know is in the same facts that Mr. Henson wanted to know from you whether you had in your mind that automatically you would impose the death penalty, and you said, "No." I want to know if you have any idea the other way, that you would automatically impose life imprisonment?

A. Oh, no, sir.

Q. And since the law does not require me to prove any particular thing in order to have the jury vote for the death penalty, I want to make sure that you don't have in your mind that you aren't going to vote for the death penalty unless I prove certain things. You have no such state of mind, do you?

A. No, sir.

Q. And you would exercise your discretion in your judgement, in your choice, and select whichever of the two penalties you thought was the appropriate one, in light of the fact that this man is a murderer in the first degree and in the light of whatever evidence is presented here about his background and history?

A. Yes.

Mr. Gustafson: Pass for cause.

The Court: All right. The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mrs. Thiel. Thank you so much.

[fol. 159] The Clerk: The next one, your Honor, is Mr. Chapek, and he has been excused because of a physical ailment.

The Court: All right, draw another name.
The Clerk: William J. Stocker, S-t-o-c-k-e-r.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Stocker, do you have any conscientious scruples against imposing the death penalty in a murder case?
Prospective Juror: Yes, sir, I do.
Mr. Gustafson: Challenge for cause.
The Court: You're excused. Call another name.
The Clerk: Joyce Ann Eccles, E-c-c-l-e-s. Is that Mrs. Eccles?
Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Eccles, do you have any conscientious scruples against inflicting the death penalty in a murder case?
Prospective Juror: Yes, I do.
Mr. Gustafson: Challenge for cause.
The Court: All right, you're excused. Call another name.
The Clerk: Merle D. Hoopingarner, H-o-o-p-i-n-g-a-r-n-e-r. Mrs. Hoopingarner?
Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Hoopingarner, do you have any conscientious scruples against inflicting the death penalty in a [fol. 160] murder case?
Prospective Juror: No, I don't.
The Court: All right, have the seat there.

Mr. Henson:

Q. Mrs. Hoopingarner, is there a Mr. Hoopingarner?
A. Yes, there is.
Q. What does he do for a living?
A. He is employed by the Tidewater Oil Company.
Q. Tidewater Oil Company?
A. Yes.
Q. In what position?
A. He is a compressor plant operator.

Q. Compressor plant operator. Do you have any children?

A. Yes, I do.

Q. What are their ages?

A. Twenty-eight and twenty-two.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No.

Q. Do you know anyone employed by his office?

A. No, I don't.

Q. The fact that Mr. Gustafson, here, has an official title as District Attorney, is that fact going to cause you to give more importance to what he says than what I have to say?

A. No.

[fol. 161] Q. The fact that he has this group of officers in back of him here to assist him, we don't have anybody, is that going to cause you to think his case is more important than ours?

A. No.

Q. How about the fact that there are these two Deputy Sheriffs here deployed on either side of the defendant here, is that going to cause you to think that he is some mad dog or something?

A. No.

Q. And where do you live, Mrs. Hoopingarner?

A. Ventura.

Q. Do you take the Ventura Star-Free Press?

A. Yes, we do.

Q. And I take it, you read about the Olga Duncan murder case?

A. Yes.

Q. And do you remember when the body of Olga Duncan was first discovered, did you see the big headlines in the paper?

A. Yes.

Q. Do you recall the frontpage statement by the District Attorney, here, concerning the connection between this case and the death penalty?

A. No, I don't remember that.

Q. You have read accounts of this case from time to time in the Ventura Star-Free Press?

[fol. 162] A. Yes.

Q. You have seen pictures of the actual trial of Elizabeth Duncan?

A. Yes.

Q. You have seen pictures of the defendant, here, Luis Moya, did you not, in the frontpage of the Ventura Star-Free Press testifying at the trial of Elizabeth Duncan?

A. I think so.

Q. Do you remember seeing various photographs of this defendant at various times in the Ventura Star-Free Press?

A. Yes.

Q. Have you seen pictures of him on television news broadcasts?

A. I haven't.

Q. Have you talked about the Duncan case with various people?

A. Yes.

Q. Have people that you have talked to expressed an opinion to you as to what penalty should be imposed upon the defendants, including Luis Moya, here.

A. I don't believe so.

Q. Do you feel you have any opinion now as to what penalty should be imposed upon this boy?

A. Not a direct opinion, no.

Q. Not a direct opinion?

A. No.

[fol. 163] Q. Do you feel that in every case of willful, deliberate and premeditated murder that the death penalty should be inflicted?

A. No, I don't think so.

Q. You have read in the Star-Free Press that Mrs. Duncan, Elizabeth Duncan, and Augustine Baldonado both received the death sentences?

A. Yes.

Q. Would that cause you to feel that this boy should also be given the death penalty because he is one of the defendants?

A. No, it wouldn't.

Q. If you had a boy twenty years old who was in the same position that this boy is, would you be willing to have his life or death judged by twelve people in the same frame of mind that you are now in?

A. Yes.

Q. Do you know of any reason so far why you couldn't be a fair and impartial juror in this case?

A. No, I don't.

Mr. Henson: We will pass Mrs. Hoopingarner for cause.

Mr. Gustafson:

Q. You don't know Mr. Henson, do you?

A. No, I don't.

Q. And you don't know of any reason why you couldn't give my side of the case a fair trial?

A. No, I don't.

[fol. 164] Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mrs. Conley. Thank you Mrs. Conley.

The Court: Call another name.

The Clerk: Willard F. McIntyre, M-c-I-n-t-y-r-e, McIntyre.

(Prospective juror sworn by the Clerk.)

The Court: Mr. McIntyre, do you have any conscientious scruples against inflicting the death penalty in a murder case?

Prospective Juror: All right, just have that seat there.

Mr. Henson:

Q. Where do you live, Mr. McIntyre?

A. Ventura.

Q. Where do you work?

A. Shell Oil Company.

Q. And your position there?

A. Geologist.

Q. Are you married?

A. Yes, sir.

Q. Do you have a family?

A. A foster son and wife.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, sir.

[fol. 165] Q. Do you know any members of his staff?

A. No, sir.

Q. And I take it you do read the Ventura Star-Free Press?

A. Quite frequently.

Q. Do you subscribe to it?

A. Yes, sir.

Q. Have you followed the accounts of the Olga Duncan murder case in the Ventura Star-Free Press?

A. Yes, sir.

Q. You have seen photographs of courtroom procedure and things like that in the paper, have you not?

A. Yes, sir.

Q. Did you read the statement that Mr. Gustafson made about the connection between this case and the death penalty?

A. I believe I did.

Q. Have you read accounts of his arguments to juries in other cases of the Elizabeth Duncan and Augustine Baldonado?

A. Yes.

Q. And have you read in those accounts of his arguments in the other cases, "That if you don't give Mrs. Duncan the gas chamber, why you can't expect to give the death penalty to the other two defendants, can you?" Have you read accounts of that argument?

A. No, I don't think so.

[fol. 166] Q. You discussed this case, the Duncan murder case, with people?

A. Yes, sir.

Q. How many people would you say you have discussed it with?

A. Quite a few, I would say. Most people in the town are interested in the case, so I have talked to quite a few people I work with and my family.

Q. Did you talk to persons who purported to have personal knowledge about the case?

A. No, sir.

Q. Did you to talk to any news reporters?

A. No, sir.

Q. Do you feel that the death penalty should be inflicted

in every case of willful, deliberate and premeditated murder?

A. Yes, under the proper processes of the law, yes.

Q. I beg your pardon?

A. Under the proper processes of law, yes, given a fair trial, presented evidence.

Q. Well, would you require the defendant, here, to prove that he should be given life imprisonment instead of death?

A. I think I would have to have some sort of proof to alter my present thinking along that line.

Q. Your present thinking is that he should be given [fol. 167] the death penalty?

A. Yes, sir.

Q. Do you feel that opinion is going to cause you to be biased against him in this case?

A. No, sir.

Q. Do you think this opinion might stay with you, might affect your judgement?

A. No.

Mr. Henson: We will pass Mr. McIntyre for cause.

Mr. Gustafson: No questions. Pass for cause.

The Court: All right, the peremptory is again with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is now with the defendant.

Mr. Henson: The defendant will excuse Mr. McIntyre. Thank you, sir.

The Court: Call another name.

The Clerk: Mary M. Welch, W-e-l-c-h.

The Court: Miss or Mrs.?

The Clerk: Mrs. Welch?

Prospective Juror: Yes.

The Clerk: Mrs., your Honor.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Welch, do you have any conscientious scruples against inflicting the death penalty in a murder case?

Prospective Juror: Yes, sir.

[fol. 168] The Court: What?

Prospective Juror: Yes, sir.

Mr. Gustafson: Challenge for cause.
The Court: You're excused.
Mr. Henson: Thank you Mrs. Welch.
The Clerk: Walter C. Bird, B-i-r-d.

(Prospective jurors sworn by the Clerk.)

The Court: Mr. Bird, is it?
Prospective Juror: Yes, sir.
The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?
Prospective Juror: No, sir.
The Court: All right, have that seat.

Mr. Henson:

Q. Mr. Bird, where do you live?
A. Port Hueneme.
Q. What is your occupation?
A. I'm with the Security First National Bank.
Q. What is your capacity there?
A. I'm a branch assistant.
Q. Do you know the District Attorney, Mr. Gustafson?
A. No, sir.
Q. Do you know any of his Deputy District Attorneys?
A. No, sir.
Q. Mr. Bird, aren't you called upon to testify every once in a while in bad check cases?
A. I have a couple of times, but not recently.
[fol. 169] Q. In fact, I think a case I had one time where you testified.
A. That is possible.
Q. Do you have any children, sir?
A. Yes, two; ten and eighteen.
Q. You have no doubt read the Oxnard Press Courier accounts of the Olga Duncan murder case?
A. Slightly. I haven't followed them very well.
Q. You haven't followed them very well?
A. No. The headlines is about the only thing.
Q. I'm sorry?
A. Just the headlines, I see. You're aware that Elizabeth Duncan was given the death penalty, were you not?
A. Yes, sir.
Q. And that Augustine Baldonado too?

A. Yes, sir.

Q. The fact that two people have already been given the death penalty for the murder, would that cause you to feel that this defendant too should be given the death penalty?

A. No, I don't believe so. It would depend. I would have an open mind.

Q. You wouldn't follow the simple solution, "What's good for the goose is good for the gander"—and they're all—

A. No.

Q. Do your feel that the death penalty should be inflicted [fol. 170] in every case of willful, deliberate and premeditated murder?

A. No, sir.

Q. Do you feel you have any opinion whatsoever at the present time as to whether this defendant should be given life imprisonment or death?

A. No, I have no opinion at the present.

Q. Any reason that you know of why you couldn't serve as a fair and impartial juror?

A. No, sir, I can think of no reason.

Mr. Henson: We will pass Mr. Bird for cause.

The Court: All right.

Mr. Gustafson:

Q. Mr. Bird, at the time that you testified in a case when you were called by Mr. Henson, was he a Deputy District Attorney in my office at that time?

A. I really don't recall him at all. It is quite possible that he was, in fact I didn't recognize him at all.

Q. You didn't, so that there would be nothing in that relationship that would cause you to be biased in his favor?

A. No.

Q. Do you know of any reason why you could not give to the People of the State of California, my client, a fair and impartial trial?

A. I can think of no reason.

Mr. Gustafson: Thank you, Mr. Bird. Pass for cause. [fol. 171] The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mrs. Petrou. Thank you.

The Clerk: Glen A. Mosbarger, M-o-s-b-a-r-g-e-r, Mosbarger.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Mosbarger, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do not.

The Court: All right. Have that seat.

Mr. Henson:

Q. Mr. Mosbarger—Mosbarger?

A. Yes, sir.

Q. What is your occupation?

A. Citrus grower.

Q. In what area?

A. Fillmore.

Q. Do you have a family, sir?

A. Yes, sir.

Q. What does that consists of?

A. A son and two daughters; thirty-one, twenty-nine and twenty-two.

Q. Are you related or is anyone near to you a law enforcement officer?

[fol. 172] A. No.

Q. Do you know the District Attorney, Mr. Gustafson?

A. Only on sight.

Q. Do you know any of the members of his staff?

A. No, I do not.

Q. Have you read about the Olga Duncan murder case?

A. Yes.

Q. Have you formed any opinion about——

A. No.

Q. Do you feel that every case of willful, deliberate and premeditated murder should be punished with the death penalty?

A. No, I don't think so.

Q. Do you feel that because the two other people have

been sentenced to death for the murder of Olga Duncan, that this boy should also be sentenced to death?

A. Not necessarily.

Q. Is there anything in your background that would cause you to lean toward the side of the prosecution?

A. Nothing that I know of.

Mr. Henson: We will pass Mr. Mosbarger for cause.

Mr. Gustafson: Pass for cause.

The Court: All right, the court has been in session now for over two hours and a half, and I'm going to adjourn until tomorrow morning at ten o'clock.

Mr. Henson: Your Honor—Thank you. All right.

[fol. 173] The Court: The jury are excused until tomorrow morning, this prospective jury or/and all of the jury panel who have not been excused will return here tomorrow morning at ten o'clock. You're now excused.

[fol. 174] Ventura, California, April 21, 1959. 10:00 a.m.

The Court: Is it stipulated the prospective jurors are present and in the box?

Mr. Henson: So stipulated.

The Court: We'd called one new juror, hadn't we?

Mr. Henson: I believe the peremptory.

Mr. Gustafson: That is what I thought.

Mr. Henson: I think I finished questioning Mr. Mosbarger, and I don't know whether the District Attorney did or not?

The Court: Mr. Mosbarger, were you the last one in the box?

Prospective Juror: Yes, sir.

The Court: I don't think the District Attorney questioned him.

Mr. Gustafson: I don't know that Mr. Henson had questioned him.

Mr. Henson: Yes, didn't I pass you Mr. Mosbarger?

Prospective Juror: Yes.

Mr. Henson: And I think I passed you for cause.

Prospective Juror: And so did he.

The Court: They both passed you for cause?

Prospective Juror: Yes.

The Court: Isn't there one juror in the box that was [fol. 175] not questioned?

Mr. Henson: No, I don't think so. I was about to excuse Mr. Mosbarger, but in the excitement at the end, we didn't do it.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mr. Mosbarger. I'm sorry to cause you the trip all of the way from Fillmore this morning.

The Court: Call another name.

The Clerk: Ollie E. Owen, O-w-e-n.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Owen, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do.

The Court: You're excused. Call another name. Will it be stipulated that I may excuse these people that have conscientious scruples without a challenge?

Mr. Henson: Yes, your Honor.

Mr. Gustafson: So stipulated.

The Clerk: Mrs. Evelyn Lopez, L-o-p-e-z, Evelyn Lopez, Mrs.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Lopez, do you have any conscientious scruples against imposing the death penalty in a murder case?

[fol. 176] Prospective Juror: I do not.

The Court: All right.

Mr. Henson:

Q. Mrs. Lopez, where do you live?
A. In Oxnard.
Q. And is there a Mr. Lopez?
A. Yes, sir, there is.
Q. What is his occupation?
A. He is a plumber.

Q. And where does he work?
A. Santa Paula Plumbing.
Q. Do you have children?
A. Yes, I have.
Q. How many?
A. Three.
Q. And what are their ages, may I ask?
A. Two boys, one fifteen, nineteen, and a girl twenty-one.
Q. Are you personally acquainted with the District Attorney, Mr. Gustafson?
A. No, I am not.
Q. Are you personally acquainted with any of the members of his staff?
A. No, I am not.
Q. Do you read the Oxnard Press Courier?
A. Yes, I do.
Q. Did you read accounts of the Olga Duncan murder [fol. 177] case in the Oxnard Press Courier?
A. Not in detail, just slightly.
Q. Did you read the headlines?
A. Yes, I did.
Q. And there were quite a few of those headlines, were there not?
A. Well, I couldn't say if there was quite a few, but I did read a few.
Q. Did you listen to radio accounts of this case?
A. No, I did not. I did hear about Mrs. Duncan over the radio.
Q. Did you hear or observe any television newscasts concerning the Olga Duncan murder case?
A. Yes, I did.
Q. I take it that you don't read detective magazines?
A. No, I don't.
Q. Mrs. Lopez, do you believe that all persons who commit willful, deliberate and premeditated murder should receive the death penalty?
A. No, I do not.
Q. In this particular case, you have probably read, have you not, in the Oxnard Press Courier, that two other people who were charged with the unlawful death of Olga Duncan were sentenced to death?
A. Yes, I did.

Q. Did you read the accounts of the Augustine Baldo-
[fol. 178] nado sentence of death?

A. No, I did not read all the accounts. I just read the headlines.

Q. The mere fact that the other two people charged with the death of Olga Duncan have received the death penalty mean to you that this boy should also receive the death penalty?

A. No, not necessarily.

Q. As a result of reading about the case in the newspapers and on the radio and on the television newscasts, do you feel you have any opinion concerning what penalty should be imposed upon this boy?

A. No, I do not.

Q. The fact that he is sitting here flanked by a Deputy Sheriff on one side of him and a Deputy Sheriff in back cause you to think that maybe he is a dangerous man or something like that; is that going to influence your decision in this case?

A. No, sir.

Q. And the fact that you know of Mr. Gustafson, do you not, the District Attorney?

A. Oh, yes, what I have read in the newspapers.

Q. Have you read any of the stories of praise for him for his work in the Elizabeth Duncan case?

A. No, I did not.

Q. The fact that he is a public official of this county, is that going to cause you to give more weight to what
[fol. 179] he says?

A. No, sir.

Q. Anyone in your family or any friend of yours connected with law enforcement in any way?

A. No, sir.

Q. Are you acquainted with any of the Oxnard police officers?

A. No, sir.

Q. Have you discussed this Olga Duncan murder case with anyone?

A. Not in detail.

Q. Other people that you have talked to express any opinions as to what penalty should be imposed upon the defendants, including this defendant, Luis Moya?

A. Yes, sir.

Q. How many people would you say expressed opinions to you concerning what penalty should be imposed?

A. Oh, I'm not exact, but say three or four.

Q. Would the fact that these persons have expressed opinions to you influence your opinion in this case?

A. No, sir.

Q. In the event that you should arrive at a verdict different from what these opinions were expressed, would that make it embarrassing for you to face these people after the trial?

A. No, sir.

[fol. 180] Q. The fact that this boy is of Spanish descent, and I take it you are too, is that right?

A. Yes, I am.

Q. Would that affect your decision one way or the other?

A. No, sir.

Q. You wouldn't lean one way to make sure that you're not favoring him?

A. No, sir.

Q. You wouldn't be prejudiced against him because maybe he has given the Spanish descendant people a bad name or something like that?

A. No, sir.

Q. Do you know of any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

A. No, sir.

Q. There was some hesitation, I mean——

A. I wanted to be sure.

Q. And there is no reservation in your mind?

A. No, sir, no.

Mr. Henson: We will pass Mrs. Lopez for cause.

Mr. Gustafson:

Q. Do you know Mr. Henson, Mrs. Lopez?

A. No, sir.

Q. And you don't know Mr. Moya?

A. No, sir.

[fol. 181] Q. Do you know of any reason why you couldn't give my side of the case a fair trial, that is the side of the People of the State of California represented by me?

A. Would you state that again, please.

Q. I say, do you know of any reason why you couldn't give my side, and you understand that my side of this case is the People of the State of California?

A. Yes.

Q. That is who I represent here.

A. No, I don't.

Q. Do you know for any reason why you couldn't give our side, my side, a fair trial?

A. No, I don't.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: The jury is satisfactory with me, your Honor.

Mr. Henson: The People will—I mean, the defendant will excuse Mr. Casey. Thank you, sir.

The Clerk: Paul N. Snyder, S-n-y-d-e-r.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Snyder, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do not.

The Court: All right, just have that seat. Go ahead.

Mr. Henson:

Q. Mr. Snyder, what is your occupation, sir?

[fol. 182] A. Chief checker.

Q. For whom?

A. Southern California Edison Company.

Q. And are you married, sir?

A. Yes, sir.

Q. Do you have children?

A. One.

Q. What is the age?

A. Sixteen.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, I do not.

Q. Do you know any of the members of his staff?

A. No.

Q. Anyone in your family or any relative of yours connected with law enforcement in any way?

A. No.

Q. While you do not have a conscientious objection to the death penalty, do you believe that it should be applied in all cases?

A. No.

Q. I mean all cases of first degree murder?

A. No.

Q. How about all cases of willful, deliberate and premeditated murder?

A. No, I do not.

[fol. 183] Q. You live where, sir?

A. In Oxnard.

Q. Do you subscribe to the Oxnard Press Courier?

A. Yes, I do.

Q. Have you read about the Olga Duncan murder case in the Oxnard Press Courier?

A. I have read some of it, not all of it, not all of it.

Q. You read some of it, but not all of it?

A. Not all of it.

Q. Do you remember reading accounts of the case before the Grand Jury took any action in the case?

A. A little bit, yes.

Q. After the Grand Jury took action, do you recall reading verbatim accounts of the Grand Jury testimony?

A. I do not.

Q. Do you recall seeing photographs of this boy along with other people involved in the case?

A. I seen one or two.

Q. Have you heard about this case on radio broadcasts?

A. A little bit, not much.

Q. How about television news broadcasts?

A. One program.

Q. Have you seen the District Attorney, Mr. Gustafson on television?

[fol. 184] A. I have not.

Q. Do you recall reading in the Oxnard Press Courier about Augustine Baldonado receiving the death penalty?

A. I do.

Q. Do you recall reading Judge Blackstock's comment to the jury complimenting them on their courage?

A Not to my knowledge.

Q. Do you recall reading in the Oxnard Press Courier the statement by the District Attorney, here, before the Grand Jury ever took any action on the case——

A. I may——

Q. Citing it as an example of why the death penalty should be kept in California.

A. I believe I read something about that.

Q. The fact that the two other people charged with the death of Olga Duncan have received the death penalty, mean to you that this defendant too should receive the death penalty?

A. No.

Q. Have you discussed this case with any other persons?

A. No, but they have with me. I mean, I haven't formed an opinion myself.

Q. Did they express their opinions to you concerning what penalty should be imposed?

A. One or two.

Q. Do you feel, as a result of any of the accounts of this [fol. 185] you have read in the newspaper, the television broadcasts, radio, discussions, statements of opinions by others, that you, yourself, have any opinion, any opinion whatsoever, at this time?

A. No, not at this time, no.

Q. Do you feel there is any reason whatsoever why you couldn't serve as a fair and impartial juror in this case?

A. No.

Q. Any one of your family ever been a victim of a crime of violence?

A. They have not.

Q. Any person in your family or a friend of yours been a witness in a case?——

A. No.

Q. —involving forcible violence?

A. No.

Q. Are you acquainted with any persons who served as trial jurors in the cases of Elizabeth Duncan and Augustine Baldonado?

A. I know of one party, I don't know his last name.

Q. Did he make any statement to you concerning the case?

A. I haven't seen him for some time.

Q. And should you have a son twenty years of age in the same position as this boy here, would you be willing to have twelve people in the same frame of mind that you're [fol. 186] now in deciding whether he should receive the death penalty or life imprisonment?

A. I would.

Mr. Henson: The defendant will pass Mr. Snyder for cause.

Mr. Gustafson:

Q. Mr. Snyder, you said you have no opinion at this time. I assume you are talking about you have no opinion on the matter which this jury is to decide, that is the penalty for Luis Moya, is that it?

A. That is correct.

Q. You would, nevertheless be willing to accept as a fact and not question it at all about the defendant's guilt of murder in the first degree?

A. That is correct.

Q. So that the only question for you to decide would be which of the two punishments is the one which you believe should be applied to him.

A. Yes, that is correct.

Q. Do you know of any reason, Mr. Snyder, why you couldn't act fairly and impartially to my side of the case, that is the People of the State of California?

A. No, I do not.

Mr. Gustafson: Pass for cause.

The Court: All right, the peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted. [fol. 187] Mr. Henson: The defendant will excuse Mr. Christensen. Thank you very much, sir.

The Court: Call another name.

The Clerk: Lynn, L-y-n-n Cate, C-a-t-e.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Cate, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, I do not.
The Court: Have that chair.

Mr. Henson:

Q. Mr. Cate, are you married, sir?
A. Yes, sir.
Q. Do you have any children?
A. Two.
Q. What are their ages?
A. Eight and ten.
Q. Eight and ten. And what is your occupation?
A. Rate accountant for Edison Company.
Q. Do you work with Mr. Snyder there?
A. Yes.
Q. You set the rate and he collects them, is that it?
A. Well, I check them. I don't set them exactly.
Q. I'm sorry?
A. I interpret them and check the rates, but I don't set them.
Q. Are you Mr. Snyder's boss, or is he your boss?
[fol. 188] A. No. We work together.
Q. You work in the same office?
A. The same office.
Q. Do you feel that both working for the Edison Company here and sitting on the same jury might affect your decision in this case?
A. Well, no, it wouldn't.
Q. Would it embarrass you to maybe disagree with Mr. Snyder in the course of the deliberations?
A. No.
Q. You're good friends, I take it?
A. We're good friends, but we have disagreed before.
Q. Mr. Cate, do you know the District Attorney, Mr. Gustafson, here?
A. Well, no, not personally, just from reports in the paper.
Q. Reports by——
A. The various papers, and I have seen him at times, but I don't know him personally.
Q. And from what you have read about him, does the fact that you have read about him, the fact he is a public

figure here, cause you to give more weight to what he mi
say than myself?

A. No.

Q. What paper do you read, sir?

A. The Times and the Ventura paper.

[fol. 189] Q. The Ventura Star-Free Press?

A. Yes.

Q. In the last couple of weeks in the Ventura Star-F
Press, do you recall reading a lot of letters to the Ed
about the Duncan case?

A. No. In fact, I don't read the editorials too muc

Q. You don't read the editorial page?

A. Once in a while, but not to a great extent.

Q. You didn't read letters pro and con about Mr. Gus
son, here, and Judge Blackstock?

A. Well, I didn't pay particular attention to it. I rem
ber reading a few of them.

Q. Now, you have undoubtedly, if you've taken the S
Free Press, read about the Olga Duncan murder case, h
you not?

A. Yes.

Q. Have you seen pictures of this boy on the front p
of the Ventura Star-Free Press?

A. Yes, I have.

Q. Have you seen photographs of the courtroom pr
dure and witnesses testifying in the Elizabeth Duncan c

A. At the beginning, yes.

Q. Any of your acquaintances attend the Elizabeth D
can murder case?

A. No.

[fol. 190] Q. Any of your friends or relatives serv
jurors in that case?

A. No. I knew them my name, but I didn't know t
personally.

Q. I see, they're maybe accounts or something like t
Any of your friends or relatives serve as jurors in
Augustine Baldonado case?

A. No.

Q. Now, you are aware that this boy, here, has plea
guilty to first degree murder?

A. Yes.

Q. Do you believe—and also he has admitted that it

willful, deliberate and premeditated. Do you understand that?

A. Yes.

Q. Do you believe that the death penalty should be imposed in every case of willful, deliberate and premeditated murder?

A. No.

Q. Would the fact that two other people, Elizabeth Duncan and Augustine Baldonado, received the death penalty in this case, cause you to maybe think, well this defendant ought to get the same thing?

A. Well, no, I would say that it was according to the evidence.

Q. I mean, do you have some opinion along that line now, [fol. 191] that because he was charged with the thing, the other two have gotten the death penalty, he ought to get the same thing?

Mr. Gustafson: I'm going to object to the form of that question, your Honor, because he isn't saying "necessarily get the same thing." It is certainly pertinent to this jury to consider the penalty in the other case as one of the factors, just so it isn't the sole and exclusive and directive factor.

Mr. Henson: I don't think that the jury should even consider what penalties were imposed in the other cases in their deliberation in this case. If that were the case, why have a separate trial?

Mr. Gustafson: That is a strange thing, because it is only Mr. Henson that has been telling them this all along.

Mr. Henson: Because it is common knowledge, because the newspapers have spread it all over and everybody knows it, but it's practically history, common knowledge things, but I don't think that it is something that they should consider in their deliberations as far as the penalty to be imposed upon this boy.

The Court: The objection is sustained. That is, wait a minute, the objection of the District Attorney, I said, is sustained. I meant to say overruled.

Mr. Henson: All right, I wonder if we could read that question back. I will rephrase it. I will give it to you again.

Q. The mere fact that the other two people charged [fol. 192] in this case received the death penalty, suggest to you, or lead you to believe, or lead you to form an opinion, or cause you to form an opinion that this boy should also receive the death penalty?

Mr. Gustafson: I'm going to object to the question on the same grounds.

The Court: The same ruling. Overruled.

Prospective Juror: No, it wouldn't.

Mr. Henson:

Q. Once again, there was some hesitation. I wonder if you have any reservations about that?

A. I may have had in the past, but I feel it is subject to a fair trial.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No.

Q. Do you know any of the members of his staff?

A. No, I have seen them, but I don't know them.

Q. Mr. Henderson, here, do you know him?

A. No.

Q. Have you seen him?

A. I have seen him, yes.

Q. Mr. Cate, is there any reason that you know of now that I haven't brought out here, any experiences in your life or anything whatsoever that you think might affect your judgment in this case?

A. No.

Mr. Henson: We will pass Mr. Casey for cause.

[fol. 193] Mr. Gustafson: No questions. Pass for cause.

The Court: All right, the peremptory is with the People.

Mr. Gustafson: I'm satisfied with the jury as it now is constituted.

Mr. Henson: The defendant will excuse Mr. Snyder. Thank you, sir.

The Court: Call another name.

The Clerk: Lloyd Dunbar, D-u-n-b-a-r.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Dunbar, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do.

The Court: You're excused. Call another name.

The Clerk: William H. Bennett, B-e-n-n-e-t-t.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Bennett, do you have any conscientious scruples against imposing the death penalty in a murder case?

A. No, I don't.

The Court: All right, have that seat.

Mr. Henson:

Q. Are you married, Mr. Bennett?

A. Yes, I am.

Q. Do you have children?

A. One.

Q. What is the age?

A. Ten months.

[fol. 194] Q. Ten months. What is your business or occupation?

A. I work for the Pacific Telephone Company.

Q. Pacific Telephone Company. I think that Mr. Sonderup, one of the jurors yesterday, also works for the company?

A. Yes.

Q. Do you know him?

A. Yes, I do.

Q. Mr. Bennett, do you subscribe to any newspapers published in Ventura County?

A. No, I do not.

Q. What paper do you read?

A. I read the Los Angeles Examiner.

Q. The Los Angeles Examiner. And did you read about the Olga Duncan murder case in the Los Angeles Examiner?

A. Some, yes.

Q. Did you see pictures in the Los Angeles Examiner of this boy, here?

A. Yes, I did.

Q. Did you see pictures in the Los Angeles Examiner of other participants in the case?

A. Yes.

Q. Did you see pictures of the District Attorney, Mr. Gustafson, in the Los Angeles Examiner?

A. I believe so. I wouldn't say for sure.

Q. Do you know Mr. Gustafson?

[fol. 195] A. No, I do not.

Q. Have you discussed this Olga Duncan murder case with other people?

A. Yes, to a certain extent, yes.

Q. How many people would you say you talked to?

A. Maybe four.

Q. Four. Did those people express opinions to you as to what penalty should be imposed upon the defendants in the case, including this boy, here?

A. Yes, they did.

Q. Did you hear or observe television newscasts about the Olga Duncan murder case?

A. Yes, I did.

Q. And have you heard radio broadcasts about the case?

A. No, I don't believe so.

Q. Do you believe that every person who commits willful, deliberate and premeditated murder should receive the death penalty?

A. No.

Q. Did you read in the Los Angeles Examiner that Elizabeth Duncan and Augustine Baldonado both received the death penalty?

A. Yes.

Q. As a result of what you have seen and heard about this case, do you have any opinion now as to what penalty [fol. 196] should be imposed upon this boy?

A. No, I don't.

Q. The fact that the other two people in this case received the death penalty mean that necessarily this boy should receive the death penalty?

A. No, I don't believe so.

Q. Anyone near to you been a victim in a crime of violence?

A. No.

Q. Anyone near to you been a police officer?

A. No.

Q. Connected with law enforcement in any way?

A. No.

Q. And if you, yourself, were twenty years of age and were in the same position as this boy, here, would you be willing to have twelve people in the same frame of mind that you are now in hearing the case and deciding whether you should get life imprisonment or death?

A. Yes, I believe so.

Q. Is there any reservations about that?

A. No.

Mr. Henson: We will pass Mr. Bennett for cause.

Mr. Gustafson:

Q. Do you know Mr. Henson, Mr. Bennett?

A. No, I do not.

Q. You don't know his client?

A. No.

[fol. 197] Q. Do you know any reason why you couldn't give my side a fair trial?

A. No.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

Mr. Henson: The defendant will excuse Mr. Bennett. Thank you, sir.

The Clerk: Jennie P. McClain, M-c-C-l-a-i-n. Is that Mrs. McClain?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. McClain, do you have any conscientious scruples against imposing death penalty in a murder case?

Prospective Juror: I do not.

The Court: All right, have that seat.

Mr. Henson: Mrs. McClain, where do you live?

A. Port Hueneme.

Q. Is there a Mr. McClain?

A. No, I'm a widow.

Q. Do you have any children?

A. Yes, one girl, two grandsons.

Q. One daughter and two grandsons. Are you acquainted with the District Attorney, Mr. Gustafson?

A. No, sir.

Q. Do you know any of the members of his staff?

[fols. 198-199] A. No.

Q. Do you feel that every person who commits willful, deliberate, premeditated murder should receive the death penalty?

A. No.

Q. Have you read about this case, the Olga Duncan murder case in the newspapers?

A. Not extensively, no.

Q. What newspaper do you customarily read?

A. The Los Angeles Times.

Q. The Los Angeles Times?

A. Yes.

Q. Do you just read the headlines or—

A. No, I read it pretty thoroughly.

Q. You read it pretty thoroughly?

A. Yes.

Q. Do you recall seeing photographs of this boy in the Los Angeles Times?

A. No, I don't.

Q. Do you recall seeing photographs of the District Attorney?

A. No, I don't recall seeing the pictures.

Q. I beg your pardon?

A. No, I don't recall seeing the pictures.

Q. Do you remember seeing the photographs of the trial of Elizabeth Duncan in the Los Angeles Times?

[fol. 200] A. I may have.

Q. Have you discussed the Olga Duncan murder case with anybody?

A. Not extensively, no. I have mentioned it.

Q. Mentioned it?

A. Mentioned it at work, you know.

Q. Where do you work?

A. The naval base in Hueneme.

Q. Did you read in the Los Angeles Times that Elizabeth Duncan and Augustine Baldonado who were also charged

with the murder of Olga Duncan received the death penalty?

A. Yes, I read that.

Q. Now, as a result of what you have heard and read, do you have any opinions as to what penalty should be imposed on this boy?

A. No, I haven't.

Q. By the way, what did Mr. McClain do when he was living?

A. He was a carpenter.

Q. I'm sorry?

A. He was a carpenter back in Iowa.

Q. I'm sorry?

A. Back in Iowa.

Q. How long have you been in Ventura County?

A. Since February, 1949.

Q. Anyone in your family or any relative been a law [fol. 201] enforcement officer?

A. No, sir.

Q. What is your particular position at the Port Hueneme —is it Port Hueneme or Mugu?

A. Port Hueneme. I'm a property and supply clerk.

Q. A property and supply clerk?

A. Yes, sir.

Q. If you should have a son twenty years of age in the same position that this boy is in, would you be willing to have twelve people in the same frame of mind that you are now in hearing the case and deciding it?

A. Yes, I would.

Q. Would you?

Mr. Henson: We will pass Mrs. McClain for cause.

Mr. Gustafson:

Q. Mrs. McClain, if you sat as a juror in this case to determine the penalty, and the judge told you that you must accept as a fact that this defendant has committed first degree murder in that he willfully, deliberately and with premeditation killed Olga Duncan, would you follow the Judge's instructions to that effect?

A. Well, I would want to review some of the opinions or the trial. I'm not expressing that very well, but I mean, I have a completely open mind.

The Court: Mrs. McClain, the defendant has pleaded guilty to murder in the first degree. He has already pleaded guilty to murder in the first degree, so that is an established fact.

[fols. 202-203] Prospective juror: Yes.

The Court: You will be so instructed, and it's your duty to follow all of the instructions of the Court so far as the law is concerned. You're supposed to find what the facts are, but so far as the law is concerned, take it from the Court. Will you do that?

Prospective Juror: Yes, sir.

Mr. Gustafson: In other words, Mrs. McClain, what I was getting at was this, with respect to Mr. Moya's guilt of murder in the first degree, you're not to have an open mind about it, because it is an established fact and there is nothing for you to decide. You have to accept that, start out with it——

A. Yes.

Q. You can't say, "Well, I wonder if he is guilty or not." You can't have an open mind on that. Now, are you willing to accept as a fact that Mr. Moya is guilty of murder in the first degree?

A. Yes.

Q. So that you would confine your inquiry not to whether or not he did this or didn't do it, because it is established that he did it, but you will simply decide what his punishment will be for doing it, will you follow that?

A. Yes, sir.

Q. And you wouldn't require, if the Judge tells you this is the law, you wouldn't require me to prove anything to [fol. 204] you if the Judge tells you that I don't have any burden of proof in this case, would you?

A. No.

Q. Neither would you require Mr. Henson to prove anything to you if the Judge tells——

A. No.

Q. —if the Judge tells you that neither he nor I have any burden of proof?

A. No.

Q. Do you know of any reason, Mrs. McClain, why you couldn't be fair to my side of the case, and you understand my side is entitled The People of the State of California.

That is the plaintiff in this case. The defendant is Luis Moya. But, since the plaintiff is The People of the State of California, there is nobody, no living person here representing that client of mine because it's all of the People. You wouldn't be prejudiced against my side or biased against my side because I don't have a live person sitting here as a client, would you?

A. No, sir.

Q. Would you consider the rights of The People of the State of California as well as the rights of the defendant?

A. Yes, sir.

Q. You don't know of any reason then why you couldn't be fair to my side of this case?

A. No reason at all.

Mr. Gustafson: Pass for cause.

[fol. 205] The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mr. Cate. Thank you, sir.

(Juror No. Seven excused.)

The Court: Call another name.

The Clerk: Gordon I. Dowd, D-o-w-d.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Dowd, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: Yes, I do.

The Court: What?

Prospective Juror: Yes, I do.

The Court: You're excused. Call another name.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Jones, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, your Honor.

The Court: All right, have that chair.

Mr. Henson:

Q. Mr. Jones, what is your occupation, sir?

A. I am a hydraulic engineer with the Civil Engineering Laboratory at Port Hueneme.

Q. Are you acquainted with anyone else on the jury [fol. 206] that might be working at the same place?

A. No, sir, but I am acquainted with Mrs. Hanson seated behind me.

Q. Are you just acquainted with her, or is she a friend or social acquaintance or what?

A. Mrs. Hanson and my wife work together at the Edison Company office.

Q. How is the Edison Company getting along with all of its employees up here? Well, Mr. Jones, are you married, sir?

A. Yes.

Q. You said you are. And do you have children?

A. No, sir.

Q. Do you know the District Attorney?

A. No, sir, I do not.

Q. Do you know any of the members of his staff, any of his Deputy District Attornies?

A. No, sir.

Q. And you live in Oxnard?

A. Yes, I live in Oxnard.

Q. Do you read the Oxnard Press Courier?

A. I do.

Q. Do you read any other daily newspapers?

A. I occasionally read the Ventura paper.

Q. While you have no conscientious objection to the death penalty as such, do you believe that it should be applied in every case of willful, deliberate and premeditated [fol. 207] murder?

A. No, I do not.

Q. Have you read in the Oxnard Press Courier about the Olga Duncan murder case in general?

A. I have read a little of it.

Q. Did you read that Elizabeth Duncan received the death penalty for the——

A. Yes.

Q. Did you read that Augustine Baldonado also received the death penalty?

A. I did.

Q. And in that article about the Augustine Baldonado death sentence, did you read that Judge Blackstock, here, complimented the jury on their courage?

A. No, I did not. As I remember it, I read the headline and that was all.

Q. The mere fact that two other people charged with the murder of Olga Duncan have received the death penalty, mean that this defendant should also receive the death penalty?

A. No, sir.

Q. Have you talked to people about the case?

A. About this particular case, no.

Q. Have you talked to them about the Olga Duncan murder case?

A. Yes.

Q. Have you heard radio broadcasts about the case?

[fol. 208] A. I have heard it mentioned on the radio, but no prolonged discussion.

Q. How about televisions newscasts?

A. No, sir.

Q. Have you seen photographs of this defendant in the Oxnard Press Courier?

A. Yes, I did.

Q. Did you see photographs of the District Attorney?

A. Yes.

Q. The fact that Mr. Gustafson, here, is the District Attorney in the County of Ventura, would that cause you to give more weight to what he says than what I might have to say?

A. No, sir.

Q. Do you feel as a result of reading about the case, hearing about it, discussing it, that you have any opinion concerning what penalty should be imposed upon this boy, here.

A. No, sir.

Q. Do you know of any reason whatever why you couldn't serve as a fair and impartial juror?

A. I do not.

Mr. Henson: We will pass Mr. Jones for cause.

Mr. Gustafson: No questions. Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

[fol. 209] Mr. Henson: The defendant will excuse Mr. Jones. Thank you.

The Clerk: Almena Gayle Caldwell, C-a-l-d-w-e-l-l. Is that Mrs. Caldwell?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Caldwell, do you have any conscientious scruples against imposing the death penalty in a murder case?

Pospective Juror: No, sir, I do not.

The Court: All right, have that chair.

Mr. Henson:

Q. Mrs. Caldwell, is there a Mr. Caldwell?

A. Yes, there is.

Q. Do you have any children?

A. No, sir, I do not.

Q. Are you employed anywhere?

A. Yes, I am. A stenographer at the Tidewater Oil.

Q. Is that in the Ventura office here?

A. Yes.

Q. Do you know the District Attorney, Mr. Gustafson?

A. I'm sure I do not.

Q. Do you know any of his Deputies?

A. No. I know Mr. Henderson's wife is all. She worked for Dr. Clark as office girl. I don't know him, however.

Q. You take the Ventura Star-Free Press, do you?

A. Yes, I do.

[fol. 210] Q. You have read about the Olga Duncan murder case in that paper?

A. Yes.

Q. You have seen photographs, have you, of this boy, here, in the Star-Free Press?

A. Yes, sir, I have.

Q. And other participants in the Olga Duncan murder case?

A. That is right.

Q. You have seen photographs, have you, of the actual

courtroom procedure, courtroom scenes of the Elizabeth Duncan trial?

A. I remember seeing it at the time the verdict was brought in of Mrs. Duncan.

Q. And have you seen pictures of the District Attorney, here?

A. Yes, I saw them at that time.

Q. While you have no conscientious objection to the death penalty as such, do you believe it should be applied in every case of willful, deliberate and premeditated murder?

A. No, sir, I do not.

Q. Have you discussed this case with other people?

A. Yes, it has been discussed at our coffee breaks at work and with my husband when we have read the paper, various things like that.

Q. Did your husband express an opinion to you as to [fol. 211] what penalty should be imposed upon the defendants, including this difendant, here?

A. No, sir, he has not.

Q. Did anyone else express an opinion to you as to what penalty should be imposed upon the defendants?

A. No, it wasn't discussed. I remember at the time we were discussing it at the office, they felt it was a dastardly crime, but I don't remember anything being said as far as penalty.

Q. They said it was a dastardly crime?

A. Yes.

Q. Do you feel that talking of the case, characterizing it that way, would cause you to be a little biased against the defendant, here?

A. Well, to be truthful with you, up until yesterday I would have thought so, but having sat through yesterday and so far this morning, I feel that you have brought out a lot of points I didn't know about as far as people's feelings, and I frankly believe I could listen to your side and Mr. Gustafson's side and with a free mind attempt to bring in a verdict.

Q. In the event that you're selected as a trial juror and you sit through the case and hear the Court's instructions and the arguments and then retire to the jury room to deliberate, would the mere fact that all the other eleven

of the jurors felt one way and you felt the other, would you merely change your vote just to get along?

A. No, sir, I would not. I would make up my own mind [fol. 212] and be fair.

Mr. Henson: We will pass Mrs Caldwell for cause.

Mr. Gustafson:

Q. Mrs. Caldwell, I guess, then, from the attention you paid to the questions yesterday and today, you understand and you would follow the directions of Judge Blackstock to the effect that I don't have to prove anything in order for the jury to justify returning a verdict fixing the penalty as death?

A. Yes.

Q. That this matter of what the penalty should be is solely and wholly in the discretion of the jury?

A. Yes, sir.

Q. So you wouldn't go into the jury room with any preconceived notions that unless Mr. Gustafson proves such and such I'm not going to return the death verdict?

A. No, sir.

Q. You don't know of any reason you couldn't give my side a fair trial, do you?

A. Certainly not.

Mr. Gustafson: Pass for cause.

The Court: Peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mrs. Lopez. Thank you.

The Court: Call another name.

[fol. 213] The Clerk: Wilma L. Wollard, W-o-l-l-a-r-d. Is it Mrs. Wollard?

The Clerk: Wilma L. Wollard, W-o-l-l-a-r-d. Is it Mrs. Wollard?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Wollard, do you have any conscientious scruples against imposing the death penalty in a murder trial?

Prospective Juror: I do.

The Court: You've excused. Call another juror.
The Clerk: Benjamin C. Ledbetter, L-e-d-b-e-t-t-e-r.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Ledbetter, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective juror: No, sir.

The Court: All right, have that seat. Let's take a few minutes recess. It is 11:00 o'clock. You're excused a few minutes until the Bailiff calls you.

(Recess.)

The Court: Mrs. Caldwell was in the box, wasn't she?
The Clerk: Yes, your Honor.
The Court: Had you examined the last juror called?

Mr. Henson: No, I hadn't examined Mr. Ledbetter yet, your Honor.

Q. Md. Ledbetter, what is your occupation, sir?
A. I'm an oil worker for Union Oil.
Q. Are you still employed?
A. Yes, sir.
[fol. 214] Q. And what particular position do you have with the Union Oil Company?
A. I'm an engineer.
Q. Engineer?
A. Yes.
Q. Are you married, sir?
A. Yes, sir.
Q. Do you have children?
A. Yes.
Q. What are their ages?
A. Their ages? Forty, thirty-eight, thirty-four and twenty-eight.
Q. Mr. Ledbetter, you live where, sir?
A. Fillmore.
Q. Fillmore. Are you acquainted with Mrs. Finnerty from Fillmore?
A. No.
Q. The lady—pardon me?
A. No, sir.

Q. Mr. Ledbetter, what newspaper do you customarily read?

A. The Star-Free Press.

Q. Have you read in the Star-Free Press about the Olga Duncan murder case?

A. I have some.

Q. Did you see photographs of this boy, here, in connec-
[fol. 215] tion with that case?

A. I think a time or two, yes.

Q. Did you see photographs of the District Attorney?

A. I don't recall seeing them.

Q. Do you recall seeing photographs of the courtroom procedure during the Elizabeth Duncan trial?

A. No, I don't recall that particularly.

Q. Any of your friends or relatives serve as jurors in the Elizabeth Duncan case?

A. No.

Q. Any of them serve as jurors in the Augustine Baldonado case?

A. No.

Q. Did you read in the Ventura Star-Free Press some time ago, before the case ever got to court, a certain statement appearing on the front page by the District Attorney, here, connecting the Olga Duncan case with the death penalty and reason for keeping it in California?

A. I don't recall that.

Q. Did you read in the Ventura Star-Free Press any of the letters to the Editor during the last two weeks?

A. No, not in connection with the case as I recall.

Q. You didn't read any of these articles commenting upon the Elizabeth Duncan case or commenting upon the District Attorney or Judge Blackstock?

A. No.

[fol. 216] Q. Well, did you read in the Ventura Star-Free Press that Elizabeth Duncan was sentenced to death?

A. Yes, the headlines. I don't very often read the details.

Q. The headlines, but you saw a big picture of the courtroom and her standing here at the Counsel table?

A. I don't recall. I probably did, yes, but I don't definitely recall it.

Q. Do you recall reading that Augustine Baldonado also received the death penalty?

A. Yes.

Q. The fact that two people charged with the death of Olga Duncan received the death penalty mean to you necessarily that this boy should also get the death penalty?

A. No, I do not.

Q. Do you believe that any person who commits willful, deliberate and premeditated murder should receive the death penalty?

A. No.

Q. Do you feel that—did you discuss this case with other people?

A. No, not—oh, I suppose I have, yes. I don't recall too much detail about it. I don't discuss those things much.

Q. Well, did other people that you talked to express opinions to you as to what penalty should be imposed upon [fol. 217] the defendant?

A. I suppose they have. I don't recall too much.

Q. As a result of what you have read and heard about this case, do you have any opinion now as to what penalty should be imposed upon this boy?

A. No.

Q. If you had a boy twenty years old, which I guess you did at one time, and he happened to be in the same circumstances as this boy, here, would you be willing to have twelve people in the same frame of mind that you are now in hearing that case——

A. Yes, I think so.

Q. —knowing that the jury is to decide between life imprisonment and death?

A. I think so.

Mr. Henson: We will pass Mr. Ledbetter for cause.

Mr. Gustafson: No questions, pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mr. Ledbetter, thank you.

The Court: Call another name.

The Clerk: Julius M. Becker, B-e-c-k-e-r, Julius M. Becker.

(Prospective juror sworn by the Clerk.)

[fol. 218] The Court: Mr. Becker, is it? Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, your Honor.

The Court: All right, have that seat.

Mr. Henson:

Q. Mr. Becker, may I inquire what your marital status is?

A. I work for the Pacific Light and Gas.

Q. I mean, are you married, sir?

A. Sir?

Q. Are you married?

A. Oh, I didn't understand your question, yes, sir.

Q. Do you have any children?

A. Yes, sir.

Q. And how many do you have?

A. One.

Q. And what is the age?

A. Over thirty.

Q. Over thirty. Is that for the Pacific Gas and Lighting?

A. Pacific Gas Supply, yes, sir.

Q. And where are you employed? I mean, where abouts, what location?

A. In Ventura.

Q. In Ventura. Do you live in Ventura?

A. Yes, sir.

[fol. 219] Q. Do you know the District Attorney, Mr. Gustafson?

A. Yes, sir.

Q. How long have you know him?

A. I have lived here thirty years. Just an acquaintance, however.

Q. Have you worked on any of his political campaigns?

A. No, sir.

Q. How did you happen to meet him?

A. Well, I have met him, you know, off and on; maybe at the club or something.

Q. Pardon me?

A. I have seen him at the club, probably, or something.

Q. Seen him at the club.

A. Just an acquaintance is all.

Q. Did you talk to him at that time, talk to him about criminal matters and so forth?

A. No, sir.

Q. Do you know Mr. Henderson, the Chief Investigator?

A. Yes, sir.

Q. Is that also a social acquaintance?

A. Just an acquaintance, yes.

Q. How about any of the other members of the District Attorney's office?

A. No.

Q. Just Mr. Gustafson and Mr. Henderson?

A. Right.

[fol. 220] Q. Has Mr. Henderson talked to you about criminal matters?

A. (Shakes head negatively.)

Q. Do you feel that through your acquaintanceship with Mr. Henderson and Mr. Gustafson, here, that you might lean toward their side of the case?

A. They probably don't even know me.

Q. Pardon me?

A. They probably wouldn't even recognize me.

Q. Well, but nevertheless, would you be influenced by your acquaintanceship with them?

A. No.

Q. Do you feel that you have any opinion about this case?

A. Yes, sir.

Q. Did you form that opinion by reading about it in the newspapers?

A. Well, probably, some.

Q. Did you talk to anyone who knew the facts of the case?

A. No.

Q. Investigated the case?

A. No.

Q. How did you, or what did you form your opinion on, what kind of information?

A. Well, it is hard to be without opinion of some [fol. 221] sort.

Q. Under the circumstances, you don't see how anybody could be without an opinion of some sort, is that right?

A. Yes.

Q. I take it you subscribe or do you read the Ventura Star-Free Press?

A. I do.

Q. Have you read about the case from the beginning last December?

A. Off and on.

Q. Did you see pictures of the District Attorney in the paper?

A. Yes.

Q. Did you see pictures of this boy in the paper?

A. Yes.

Q. See photographs of the Elizabeth Duncan trial in the paper?

A. That is right.

Q. And you feel that this opinion that you have now would prevent you from acting fairly and impartially in the case?

A. I think not.

Q. Do you think that even though you do have an opinion, that you could still fairly and impartially try the case?

A. I think so.

Q. You probably have read that the other—that Mrs. [fol. 222] Elizabeth Duncan and Augustine Baldonado both received the death penalty?

A. Right.

Q. The fact that they received the death penalty suggest to you or mean to you necessarily that this boy should also?

A. No.

Q. Let's put it this way now, if you had a boy twenty years old now on trial in the same kind of position that this boy is in, would you be willing to have twelve people in the same frame of mind that you are now in hearing the case?

A. I would be very happy.

Mr. Henson: We will pass Mr. Becker for cause.

Mr. Gustafson: No questions. Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mr. Bird. Thank you, sir.

The Clerk: Mrs. Grace E. Dominy.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Dominy, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: All right, have that seat.

Mr. Henson:

Q. Mrs. Dominy, where do you live?

[fol. 223] A. In Simi.

Q. Is there a Mr. Dominy?

A. Yes, sir.

Q. Do you have any children?

A. No, sir.

Q. Is Mr. Dominy working at the present time?

A. No, sir, he is retired, except at home he works, but he has no job.

Q. What did he do before he retired?

A. He was a cattleman, a cattle raiser.

Q. A cattle raiser out in the Simi Valley?

A. No, in Inyo County.

Q. How long have you lived in Simi?

A. About thirteen years.

Q. Mrs. Dominy, have you read about this case in the newspaper, the Olga Duncan murder case?

A. Well, some, but not too much.

Q. What paper do you read out in Simi there?

A. Well, the Times mostly.

Q. The Los Angeles Times?

A. (Nods head to the affirmative.) Yes. I have had a few copies of the Free-Press, but we don't take it.

Q. Well, I mean, did you get these copies of the Free-Press, the Ventura Star-Free Press, just to read about this case?

A. Well, I was on the—I was called on the panel for Mrs.

Duncan, and of course my friends thought I should read [fol. 224] about it, but I wasn't so much interested and I didn't read very much about it.

Q. You were called on the panel for the Elizabeth Duncan case?

A. I wasn't in the jury box, but I was called as a juror. Don't you call that the panel?

Q. Yes, that is right, I am just surprised that is all.

A. How is that?

Q. I'm just surprised that is all.

A. Oh, excuse me.

Q. Did any of your friends serve on the Elizabeth Duncan case?

A. No.

Q. You say people suggested to you that you should read about the case before you could be a juror?

A. No, it was after I was excused that my friends thought I should read about this case. They thought I would be very much interested.

Q. Oh, well, were you interested enough in the case to form any opinion about what penalty should be imposed against the defendants, including this boy, here?

A. No.

Q. Do you have any opinion now——

A. No.

Q. —based upon what you read?

[fol. 225] A. No, I haven't.

Q. And has your husband expressed any opinion to you?

A. No, not to me.

Q. Has he—well, have you heard him express it to others?

A. No.

Q. Do you know of any reason whatsoever why you couldn't serve as a juror in this case where—now the two penalties that you're to impose here, are either life imprisonment or death, you know that?

A. Yes.

Q. And knowing that, do you think you could serve as a fair and impartial juror?

A. Yes, I think I could.

Q. Your husband or any of your family or relatives connected with law enforcement in any way?

A. No; I have a friend who is on the force, but I have no relatives.

Q. On the police force?

A. Ventura, John Chamberlain.

Q. Oh, John Chamberlain. Has he talked to you about this case?

A. No, haven't seen him in months.

Q. I see.

We will pass Mrs. Dominy for cause.

[fol. 225a] Mr. Gustafson: No questions. Pass for cause.

The Court: All right, the peremptory is with the People.

Mr. Gustafson: I accept the jury.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mr. Becker. Thank you, sir.

The Clerk: Marion, that is M-a-r-i-o-n H. Marks, M-a-r-k-s.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Marks, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: Yes.

The Court: You're excused. Call another name.

The Clerk: William R. Mathews, M-a-t-h-e-w-s.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Mathews, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: Have that chair.

Mr. Henson:

Q. Mr. Mathews, are you married, sir?

A. Yes.

Q. Pardon me?

A. Yes, sir.

Q. Do you have any children?

A. Yes, sir, two.

[fol. 225b] Q. What are their ages?

A. Two and a half and one.

Q. What is your business or occupation?
A. Clerk, Santa Cruz Market on Main.
Q. A clerk at the Santa Cruz Market in Ventura?
A. Yes, on Main Street.
Q. I'm sorry?
A. On Main Street.
Q. Are you acquainted with the District Attorney, here?
A. No, sir.
Q. Are you acquainted or do you know any of the members of his staff?
A. No, sir.
Q. And you live where, sir?
A. In Oak View.
Q. Do you subscribe to the Ventura Star-Free Press?
A. Yes, sir.
Q. Have you read about the Olga Duncan murder case in the Ventura Star-Free Press?
A. Yes, sir.
Q. Have you seen photographs of this boy, here, in the Ventura Star-Free Press?
A. I believe I have.
Q. Did you read any statements by Mr. Gustafson, here, about the penalty that he was going to ask for in [fol. 225c] this case?
A. Well, something, I don't remember the nature of it.
Q. While you have no conscientious objection to the death penalty, do you believe that it should be applied in every case of willful, deliberate and premeditated murder?
A. No, sir.
Q. Have you discussed the Olga Duncan murder case with anyone?
A. Well, just to pass it off, something like that.
Q. Pardon me?
A. Somebody bring it up, you know, just a few words.
Q. Have you heard about it on television?
A. Yes.
Q. Have you seen Mr. Gustafson on television programs?
A. I don't think so.
Q. You have read that the Elizabeth Duncan and Augustine Baldonado both received the death penalty in this case, have you not?
A. Yes.

Q. Now, the fact that those two persons received the death penalty mean to you that necessarily that this boy should also receive the death penalty?

A. I do not.

Q. Do you feel you have any opinion based upon what [fol. 225d] you have read or heard?

A. Not from reading the papers, no.

Q. Pardon me?

A. Not reading it from the papers, no.

Q. How about what people have said to you?

A. No.

Mr. Henson: We will pass Mr. Mathews for cause.

Mr. Gustafson:

Mr. Mathews, you don't know of any reason why you couldn't be fair to my side of the case, the People of the State of California, do you?

A. No.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury.

The Court: The peremptory is with the defendant.

Mr. Henson: Yes. The defendant will excuse Mrs. McClain. Thank you.

The Court: You know you have only one more peremptory?

Mr. Henson: Yes, your Honor.

The Clerk: Jack F. Anderson, A-n-d-e-r-s-o-n.

(Propspective juror sworn by the Clerk.)

The Court: Mr. Anderson, do you have any conscientious scruples against imposing the death penalty in the proper case?

Prospective Juror: I do not.

[fol. 225e] The Court: All right, have that seat.

Mr. Henson:

Q. Mr. Anderson, what is your occupation?

A. I'm an electrical engineer.

Q. And for whom are you employed?

A. Schlumberger Well Surveying Corporation.

Q. Do you live here in Ventura?
A. I do.
Q. Are you married, sir?
A. Yes, sir.
Q. Do you have any children?
A. Yes, sir.
Q. How many?
A. Six.
Q. What are their ages?
A. One, four, five, seven, eight and ten.
Q. Let me ask you, do you know the District Attorney, here, Mr. Gustafson?
A. I do not.
Q. Do you know any of the members of his staff?
A. I do not.
Q. Any of your friends connected with law enforcement work?
A. No.
Q. Any of your friends serve as jurors in the case of Elizabeth Duncan or Augustine Baldonado?
A. No.
[fol. 225f] Q. Have you read about the Olga Duncan murder case in the Ventura Star-Free Press?
A. Yes.
Q. Have you seen television newscasts about it?
A. Yes.
Q. Have you seen photographs of this boy in the newspaper?
A. Yes.
Q. Have you seen photographs of him in the television news broadcasts?
A. I don't really recall.
Q. Have you read any statements by the District Attorney, here, before the case was even presented to the Grand Jury?
A. Yes.
Q. And did you read the statement that he made citing this case as an example of why the death penalty should remain in California?
A. Not specifically, but vaguely.
Q. Have you read other accounts of interviews with him about this case?

A. Yes.

Q. Have you talked to people about the case?

A. Yes.

Q. Have people expressed opinions to you?

A. Not on the penalty as such. No considered judg-
[fol. 225g] ments.

Q. Do you, yourself, have any kind of an opinion whether it be a tentative opinion or whether it be some other kind of opinion as to what penalty should be imposed upon this boy?

A. I do not.

Q. Notwithstanding all that you have read about this case, do you think that you can listen to the evidence in this case?

A. I believe so.

Mr. Henson: We will pass Mr. Anderson for cause, your Honor.

Mr. Gustafson: No questions. Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury.

The Court: The peremptory is with the defendant.

Mr. Henson: The defendant will excuse Mr. Anderson. Thank you.

The Court: Call another name.

The Clerk: Anna C. Martin, M-a-r-t-i-n. Mrs. Martin?

Prospective Juror: Yes.

The Clerk: Mrs. Martin, your Honor.

The Court: Very well.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Martin, do you have any conscientious scruples against imposing the death penalty in a murder case?

[fol. 225h] Prospective Juror: I do not.

The Court: All right, have that seat.

Mr. Henson:

Q. Mrs. Martin, is there a Mr. Martin?

A. Yes, sir.

Q. What is his occupation?

A. He is an automobile electrician.

Q. And for whom is he employed?
A. The Oxnard Auto Electric.
Q. Do you have children?
A. I have two.
Q. What are their ages, may I ask?
A. Thirty-eight and forty-one.
Q. Are you employed, yourself?
A. No, sir, not at the present.
Q. Have you been employed?
A. Yes.
Q. Where?
A. At the Camarillo State Hospital.
Q. And what was your position there?
A. Psychiatric technician.
Q. How long did you work there?
A. About fifteen years.
Q. Do you know the District Attorney, Mr. Gustafson?
A. No, sir.
Q. Do you know Mr. Henderson, the man——
A. No.
[fol. 225i] Q. Do you know any of these men here?
A. No.
Q. What paper do you read, Mrs. Martin?
A. The Oxnard Courier.
Q. Have you read about this Olga Duncan murder case in that paper?
A. I have.
Q. Incidentally, the fact that the District Attorney, here, has a number of people to assist him in the trial of this case and I do not, is that going to have any bearing upon your decision?
A. No.
Q. The fact that he has all of these men to call upon for advice and for assistance isn't going to make you think that maybe he is much more important or that his case is much more important than this defendant's case?
A. No, sir.
Q. Did you read in the Oxnard Press Courier about the trial of Augustine Baldonado?
A. I did.
Q. Did you read the printed comment of Judge Blackstock, complimenting——

A. I don't remember reading that.

Q. You have talked to people about this case?

A. Some.

Q. Have people expressed opinions to you about this [fol. 225j] case?

A. Not necessarily their opinion as to what the penalty should be.

Q. What kind of opinions did they express?

A. As to the guilt of the parties concerned.

Q. Do you feel that discussing the case with other people and reading about it in the paper, that you have some kind of an opinion as to what penalty should be imposed upon this boy?

A. I do not.

Q. The fact that two other people have received the death penalty, would that mean to you that this boy should be treated the same way?

A. No.

Q. If you had a boy twenty years old in the same situation as this boy, would you be willing to have twelve people in the same frame of mind that you are now in hearing that case?

A. I would.

Q. Knowing that you have the power of life or death in your hands?

A. That's right.

Q. Do you know of any reason whatsoever why you couldn't be a fair and impartial juror in this case?

A. No.

Mr. Henson: We will pass Mrs. Martin for cause.

[fol. 225k] The Court: The peremptory is with the people.

Mr. Gustafson: I pass Mrs. Martin for cause, but I excuse her on a peremptory.

The Court: You excuse her?

Mr. Gustafson: Yes.

The Court: You're excused, Mrs. Martin.

The Clerk: Evren, that is E-v-r-e-n Morris, M-o-r-r-i-s, Evren Morris.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Morris, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No.

The Court: Have that chair.

Mr. Henson:

Q. Mr. Morris, what is your occupation, sir?

A. Mechanic.

Q. And for whom are you employed?

A. Pacific Light and Gas Supply Company.

Q. Are you acquainted with anyone else there on the jury panel that works for the same institution, the same organization?

A. I knew Mr. Becker who was on here.

Q. That is right. I couldn't remember just who it was. Do you have a family, sir?

A. I have a wife.

Q. Do you know the District Attorney, Mr. Gustafson? [fol. 225l] A. Not personally.

Q. You have heard of him, is that it?

A. Yes.

Q. Read about him in the newspaper?

A. Yes.

Q. Seen him on television?

A. Yes.

Q. Heard comments about him?

A. I probably did, yes.

Q. Do you know any of the members of his staff?

A. No, I don't.

Q. And you live where, sir?

A. In Ventura.

Q. Do you subscribe to the Ventura Star-Free Press?

A. Yes.

Q. Have you read about the Olga Duncan murder case in the Ventura Star-Free Press?

A. I read some of it.

Q. Have you seen photographs of this boy, here, appearing in the Ventura Star-Free Press?

A. Yes.

Q. Have you seen photographs of the trial of Elizabeth Duncan appearing in the Ventura Star-Free Press?

A. Yes.

Q. Have you seen or observed television newscasts about this case?

[fol. 225-m] A. I saw one or two of them, I believe.

Q. Have you talked to people about this case?

A. Not in detail, no.

Q. Have people that you have talked to expressed opinions to you as to what penalty should be imposed upon the defendants, including this boy, here.

A. Some of them have.

Q. Do you feel that as a result of what you have seen and heard about this case that you, yourself, have some kind of an opinion as to what penalty should be imposed upon this boy?

A. Yes, I do.

Q. And do you feel that this opinion would prevent you from acting fairly and impartially, even though you tried hard to do so?

(Pause).

A. Well——

Q. Let me put it another way. You do have an opinion, is that right?

A. Yes.

Q. Did you talk to anybody that said that they knew all about this case, that they had personal knowledge about the case?

A. No, I haven't.

Q. I see. Now, with this opinion, do you think that because of that opinion, you could not act fairly and impartially?

[fol. 225n] A. I believe I could.

Q. I mean, I know you would try, but I wondered if you felt that you really could.

A. I believe so.

Q. Would it take some evidence to change the opinion that you now have.

A. I would hear all of the evidence and——

Q. I mean, supposing nobody put on any evidence, you would go the way your opinion is now, wouldn't you?

A. I would ha no choice but to——

Q. You feel that if no evidence were presented whatso-

ever, you would have no choice in the matter and you would follow your personal opinion, is that right?

A. I believe I would, yes.

Mr. Henson: Your Honor, it's rather doubtful, but I do challenge this juror for cause since I think he has an opinion which will, while he will try to be fair and impartial, I think that it would prevent him from being fair and impartial no matter how hard he tries.

Mr. Gustafson: Your Honor, I certainly resist that challenge. There is actually no showing made here of a challenge for cause with respect to this juror. The juror says he has an opinion, but that he will, nevertheless, notwithstanding that opinion, fairly and impartially try the case. He was asked the question whether if he heard nothing he would have the same opinion, and the obvious answer is yes. There is nothing that disqualifies this juror for [fol. 225o] cause, on the basis of the answer heretofore given.

The Court: Mr. Morris, is it?

Prospective Juror: Yes.

The Court: If you should serve on this jury, could you be absolutely fair and impartial to both sides?

Prospective Juror: I believe so, yes.

The Court: Well, do you know so?

Prospective Juror: Yes.

The Court: It is entirely within the discretion of the jury, you know, to fix the penalty, either death or life imprisonment. You have got to fix one or the other.

Prospective Juror: I understand that.

The Court: You have to take all of the instructions from the Court so far as the law is concerned. Would you do that?

Prospective Juror: Yes, I would.

The Court: And you say you have some opinion. Do you mean to say that your mind is made up, that you're going to inflict either one penalty or the other. Of course, you know you have to do that.

Prospective Juror: The way I feel now, yes, sir.

The Court: Well, you would have to fix one penalty or the other because that is the law. You have either got to fix the deather penalty or life imprisonment, do you understand that?

[fol. 225p] Prospective Juror: Yes.

The Court: Is your mind made up already as to which one you would inflict?

Prospective Juror: Unless I can hear something different to change my mind.

The Court: What?

Prospective Juror: Unless I hear something to change my mind it is. I have an opinion now.

The Court: If you didn't hear anything at all, any evidence at all, you would adhere to the opinion that you have now?

Prospective Juror: Yes, I would.

The Court: I think since the defendant has no more peremptories, this challenge should be allowed. The challenge is allowed.

Mr. Gustafson: Well——

The Court: You're excused.

The Clerk: Elizabeth M. White, W-h-i-t-e.

The Court: Mrs.?

The Clerk: Is it Mrs. White?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. White, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I do.

The Court: All right, you're excused. Call another [fol. 225q] name.

The Clerk: Farra, that is F-a-r-r-a P. Drexler, D-r-e-x-l-e-r. Mrs. Drexler.

Prospective Juror: Drexler, "D" as in Denver.

The Clerk: Yes, Drexler. Is that Mrs.?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Drexler, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: I have.

The Court: You're excused. Call another one.

The Clerk: Pearl L. Connelly, C-o-n-n-e-l-l-y. Mrs. Connelley?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. Connelley, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: Yes, I do have.

The Court: You're excused. Call another name.

The Clerk: Doris L. Wilson, W-i-l-s-o-n.

(Prospective juror sworn by the Clerk.)

Is that Mrs.?

Prospective Juror: Yes.

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

[fol. 225r] Prospective Juror: I do.

The Court: What?

Prospective Juror: I do.

The Court: All right, you're excused.

The Clerk: James O. Bailey, B-a-i-l-e-y.

(Prospective juror sworn by the Clerk.)

The Court: Mr. Bailey, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: All right, have that seat.

Mr. Henson:

Q. Mr. Bailey, what is your occupation, sir?

A. Automobile dealer.

Q. You're the Bailey Motors, is that correct?

A. Right.

Q. That is located in Oxnard?

A. Right.

Q. Are you married, sir?

A. Yes, sir.

Q. And do you have children?

A. One, seven.

Q. Being in Oxnard, are you acquainted with the District Attorney?

A. Yes, sir.

Q. Are you in service clubs with him?

A. Yes, sir.

[fol. 225s] Q. Are you a personal friend of his?

A. I would consider it, yes.

Q. Do you know any of the members of his staff?

A. I don't believe so.

Q. Do you know Mr. Henderson in the checkered coat, here?

A. No, sir.

Q. Do you feel that your friendship with Mr. Gustafson, here, would cause you to lean his way in this case?

A. No, sir.

Q. About how often do you see him?

A. Oh, I would say once a month.

Q. At the Elks Club or something like that?

A. Yes.

Q. Have you discussed criminal cases with him?

A. No, sir.

Q. Have you talked to him about this Olga Duncan murder case?

A. No, sir.

Q. Do you know other people connected with law enforcement, do you?

A. Yes, sir.

Q. Members of the Oxnard Police Department?

A. Yes, sir.

Q. Members of the Sheriff's Department?

A. Yes, sir.

[fol. 225t] Q. Have you talked to people about this Olga Duncan murder case?

A. I have heard it discussed. I haven't talked to anyone especially about it.

Q. Have you heard persons express opinions as to what penalty should be imposed upon the defendants?

A. No, sir.

Q. What kind of comments have you heard about the case?

A. None on this particular case. The other cases before

this, just the usual comment, say a dealers' meeting we were in on some discussions about it.

Q. You have read about this case in the Oxnard Press Courier?

A. Yes.

Q. Did you read there that Elizabeth Duncan received the death penalty?

A. Yes.

Q. Augustine Baldonado received the death penalty?

A. Yes, sir.

Q. In the article about the Augustine Baldonado death penalty, did you read that Judge Blackstock complimented the jury upon their courage?

A. No, sir, I didn't read that.

Q. Do you think that the death penalty should be imposed in each case of a willful, deliberate and premeditated [fol. 225u] murder.

A. Not especially.

The Court: What is the answer?

Prospective Juror: Not especially.

Mr. Henson:

Q. Do you feel that because the other two defendants in the case, the two other people charged with the murder of Olga Duncan, have received the death penalty, that this boy, here, should receive the death penalty too?

A. No.

Q. Do you have any opinions as to what penalty should be imposed in this case?

A. Not at this time.

Q. Have you ever had an opinion?

A. No, sir.

Q. I want you to be as honest as you can about this, Mr. Bailey; you're a member of the Elks Club with Mr. Gustafson, is that right?

A. That is right.

Q. Have you seen him at other club meetings?

A. Yes.

Q. And you consider yourself a personal friend?

A. Yes.

Q. And don't you feel that you would attach more weight to what he says than what I might say about the case?

A. I don't believe so.

Q. Do you feel that it would be embarrassing to you to meet him after this case is over and maybe decide it [fol. 225v] against the case that he was trying to present?

A. No, sir.

Q. Do you hold an office in the Elks Club?

A. No, sir.

Q. What other club meetings have you seen Mr. Gustafson at?

A. I can't think of any club meeting. I have seen him at get-together social functions with man and wife; several couples go.

Q. Did you work on any campaign for election where he was running for election?

A. No, sir.

Q. Does your wife know his wife?

A. Yes, sir.

Q. Do you have common friends in this social group?

A. Yes, sir.

Q. And you feel that this close personal relationship here would not prevent you from acting fairly and impartially in this case?

A. No, sir.

Q. And you have no opinion at this time about what penalty should be imposed in this case?

A. Not at this time.

Mr. Henson: I'll have to pass Mr. Bailey for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: Pass Mr. Bailey for cause. I will excuse [fol. 225w] Mr. Mathews.

The Court: Call another name.

The Clerk: Percy Earl Ball, B-a-l-l.

(Prospective juror sworn by the Clerk.)

The Court: Do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: Have that chair.

Ladies and gentlemen of the jury, the court is about to adjourn until 2:00 o'clock this afternoon. I think it will be better if you don't discuss this case among yourselves or with anyone else in the meantime.

You're excused until 2:00 o'clock this afternoon. All of the rest of this jury panel will return at that time.

(Noon recess.)

[fol. 225x] Ventura, California, April 21, 1959. 2:00 p.m.

The Court: The jury are all present. Proceed.

Mr. Henson: So stipulated.

I believe, Mr. Ball, you had just taken the chair, is that correct?

Prospective Juror: Yes.

Mr. Henson:

Q. What is your occupation, sir?
A. Carpenter.
Q. Carpenter?
A. Yes.
Q. Where do you live?
A. Piru.
Q. Are you self-employed?
A. No, I'm working for a contractor.
Q. Do you work steadily for any particular person?
A. Yes, sir.
Q. Who is that?
A. Carl Seeker.
Q. Carl Seeker?
A. Yes, sir.
Q. Do you have a family, sir?
A. A wife.
Q. Do you know the District Attorney, Mr. Gustafson?
A. No, sir.
Q. Do you know Mr. Henderson, he is no longer in the [fol. 225y] checkered jacket, but in the suit, here?
A. No, sir.
Q. Anyone in your family connected with law enforcement?
A. No, sir.
Q. Any close friends in law enforcement?
A. No.
Q. What paper do you read out there in Piru?
A. The Free-Press.
Q. The Free-Press?

A. Yes.

Q. You read about the Olga Duncan case in the Ventura Star-Free Press?

A. Yes, sir, to some extent.

Q. You read the headlines?

A. Yes.

Q. And there were a great number of headlines, were there not?

A. Yes.

Q. Do you remember seeing photographs of this defendant in the Ventura Star-Free Press?

A. Yes, sir.

Q. Photographs of the District Attorney?

A. Yes, sir.

Q. Photographs of scenes from the Elizabeth Duncan trial?

[fol. 225z] A. Yes, I believe so.

Q. Do you recall seeing any statements printed there about what the District Attorney said before the case was even presented to the Grand Jury about what penalty he would ask for?

A. I believe I recall something about that.

Q. You read in the Ventura Star-Free Press that Elizabeth Duncan received the death penalty?

A. Yes.

Q. Have you discussed this case with your fellow workers or with anyone?

A. Oh, to a slight extent.

Q. The fact that the two other people in this case have received the death penalty for the murder of Olga Duncan, would that necessarily mean to you that this defendant, here, should receive the same penalty?

A. No, sir.

Q. Do you believe that in every case of willful, deliberate and premeditated murder that the death penalty should be inflicted?

A. No, not necessarily.

Q. Do you have an opinion based upon that you have read in the paper and what people have stated to you as to what penalty should be inflicted upon this defendant?

A. That is a hard question to answer without qualifying it.

[fol. 225a-1] Q. You qualify it all you want to, sir.

A. With all of the publicity this case has had, I find myself with some conclusions, whatever you want to call them, but as I feel, convicting a man, sentencing him to death is a very serious thing to me. Something for a lot of consideration, and I wouldn't want to have to base my verdict on what I read in the newspaper or what somebody told me or anything of that sort.

Q. Well, will your conclusions that you have formed enter into your judgment of this case?

A. No, not if you can present the facts so that I should see to the contrary.

Q. You mean you want me to—you believe that I should prove something that would eliminate this opinion from your mind?

A. Well, I mean a fellow don't like to take the words from a newspaper and consider that as facts. You want it straight from the horse's mouth.

Q. Well, would you require the defendant, here, or myself, as his attorney, to prove to the contrary of what your present conclusions are?

A. I don't say it would be proof. I would say present the facts so that we will know what to judge from.

Q. Well, we will do that, but I mean would you require that we remove this conclusion from your mind?

A. No, I don't think you would have to remove it com-[fol. 225b-1] pletely. I mean if you can show some facts that shows a reason for changing my conclusions, why I'm very willing to change.

Q. As you sit right here now, if there were no evidence introduced whatsoever, would you vote the way your conclusions are now, which you have formed from the newspapers?

A. Well, maybe I don't understand your definition of evidence there. If you would just get up and say, "Well, what you have read in the newspapers is true," well there should be nothing else to judge from.

Q. I mean, supposing I did get up and say—you understand what I say here and what Mr. Gustafson says isn't evidence. The evidence only comes from the witness stand or from evidence that has been introduced by Judge Blackstock.

A. But you are going to give us the facts, all of the facts of the case?

Q. We will try to do our best. That's why we are here.

A. That's what I mean. I mean I don't want to consider the newspaper as facts.

Q. All right, well, in listening to the evidence, will you, whatever you have heard in the newspapers, will that affect your opinion, your deliberations?

A. Not at all.

Q. So that, notwithstanding any opinion or conclusion [fol. 225c-1] that you might have formed from reading the newspaper, you think you can still fairly and impartially try this case?

A. I think so, yes, sir.

Q. Is there any reservation?

A. No.

Mr. Henson: We will pass Mr. Ball for cause.

Mr. Gustafson: Mr. Ball, you said convicting a man is something for a lot of consideration, now you're not going to be faced in this trial with whether you convict Mr. Moya or not, because he stands convicted of murder in the first degree. You're willing to accept that, are you not, as a fact?

A. That is right.

Q. So that you won't go into the jury room and question whether he is guilty or murder in the first degree?

A. No.

Q. You will accept that and start from there and determine what his penalty should be?

A. Right.

Mr. Gustafson: Pass for cause.

The Court: All right, the peremptory is with the People.

Mr. Gustafson: I will excuse Mrs. Hoopingarner.

The Court: Call another name.

The Clerk: Edward E. Hart, H-a-r-t.

[fol. 225d-1] (Prospective juror sworn by the Clerk.)

The Court: Mr. Hart, do you have any conscientious scruples against the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: All right, have that chair there.

Mr. Henson:

Q. Mr. Hart, where do you live, sir?
A. Moorpark.
Q. Are you acquainted with any of the jurors in the box?
A. No, sir.
Q. What is your occupation and business?
A. Machinist.
Q. And for whom are you employed?
A. Rocketdyne.
Q. And do you have a family, sir?
A. Yes, sir.
Q. What does that consist of?
A. Five children.
Q. Five children?
A. Yes, sir.
Q. And what are thejr ages?
A. Two, four, five, eight, and ten.
Q. Are you acquainted with the District Attorney, Mr. Gustafson?
A. No, sir.
Q. Are you acquainted with any of the members of [fol. 225e-1] his staff?
A. No.
Q. Anyone near to you a member of any law enforcement agency?
A. No, sir.
Q. You're not in any security field at Rocketdyne——
A. No, sir.
Q. —other than machine items. And do you read the Oxnard Press Courier?
A. No, sir.
Q. What paper do you read?
A. The Times.
Q. The Los Angeles Times?
A. Yes, sir.
Q. Have you read about the Olga Duncan murder case in the Los Angeles Times?
A. Very little.
Q. Have you seen pictures of various parties involved?
A. Just glanced at them.
Q. Glanced at them. Have you seen television news programs concerned with the case?

A. Once or twice.

Q. Once or twice?

A. Yes.

Q. Have you seen photographs in the Los Angeles Times [fol. 225f-1] of actual Courtroom scenes in the Elizabeth Duncan case?

A. I couldn't say.

Q. Did you read the Elizabeth Duncan received the death penalty?

A. Yes.

Q. Did you read that Augustine Baldonado received the death penalty?

A. No, I heard that here yesterday.

Q. Pardon me?

A. I heard that here yesterday.

Q. Well, would the fact that two people have already been sentenced to death for this murder mean to you that this defendant, here, necessarily should also be sentenced to death?

A. Not necessarily.

Q. Do you think that maybe more likely than not, he should?

A. No.

Q. Do you feel that in every case of willful, deliberate [redacted]meditated murder that the death penalty should be inflicted?

A. No, sir.

Q. Do you feel you have any opinion about what penalty should be imposed in this case?

A. Well, I have. It is pretty hard not to form an [fol. 225g-1] opinion.

Q. You do have an opinion then?

A. Yes.

Q. And it would take some evidence to remove or change that opinion?

A. I feel, as I hear the facts presented, I can make up my mind. It can be changed. My opinion is not binding, let's put it that way.

Q. Well, is your opinion going to influence your reception of the evidence here?

A. No, sir.

Q. Do you think your opinion is going to affect your deliberation in the jury room?

A. No, sir.

Q. Do you feel, then, that even though you do have this opinion, you can still judge the case fairly and impartially?

A. Yes, sir.

Q. Now, assuming that one of your sons, if you do have one, some twenty years of age is on the trial in a similar situation as this, would you be willing to have twelve people in the same frame of mind that you're now in hearing the case, understanding that each of those twelve people has some opinion?

A. Yes, sir, I believe I would.

Mr. Henson: We will pass Mr. Hart for cause.

[225h-1] Mr. Gustafson:

Q. No reason, is there, Mr. Hart, why you couldn't give my client, the People of the State of California a fair trial?

A. No.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: We will excuse Mr. Smith.

The Clerk: Evelyn C. DeMarco, D-e-M-a-r-c-o. Is that Mrs. DeMarco?

Prospective Juror: Yes.

(Prospective juror sworn by the Clerk.)

The Court: Mrs. DeMarco, do you have any conscientious scruples against imposing the death penalty in a murder case?

Prospective Juror: No, I don't.

The Court: All right, have that chair.

Mr. Henson:

Q. Mrs. DeMarco, is there a Mr. DeMarco now?

A. Yes.

Q. Do you have children?

A. Yes, two boys, fifteen and sixteen.

Q. What does Mr. DeMarco do?

A. He is a self-employed cattle rancher.

Q. Whereabouts?

A. Santa Paula.

[fol. 225i-1] Q. Do you work, yourself?

A. Yes, I'm the office manager Mahan's Furniture Store.

Q. Have you or do you know the District Attorney, Mr. Gustafson?

A. No, I don't.

Q. Do you know any members of his staff.

A. No.

Q. Anyone near to you a member of a law enforcement agency?

A. No, sir.

Q. Any member of your family ever been a victim of a crime of violence?

A. No.

Q. Does the fact that the District Attorney, here, has members of his staff to call upon to advise and to run errands and things like that and I don't, is that going to cause you to think he is more important and his case is more important?

A. No, sir.

Q. You understand that my duty here is to defend this boy?

A. Yes, I do.

Q. And supposing that the District Attorney and myself, here, should have an argument about a certain matter of law or a certain matter of evidence, are you going to [fol. 225j-1] allow our personalities to enter into the case at all?

A. No.

Q. You read about this case in the newspaper?

A. I have read something of it. We take the Santa Paula Chronicle and usually pick up a Los Angeles paper.

Q. That Santa Paula Chronicle is what, a weekly?

A. No, it's a daily. Five days a week.

Q. Pardon me?

A. Five days a week.

Q. Oh, five days a week. What Los Angeles paper do you generally pick up?

A. We generally get the Times.

Q. You did read about this case?

A. I did. I—not extensively, but I did read some of it.

Q. You read that Elizabeth Duncan received the death penalty?

A. Yes.

Q. Augustine Baldonado too received the death penalty?

A. Well, I think I heard more about that on the radio than reading about it.

Q. What particular radio station do you listen to?

A. Oh, one of the Los Angeles stations, usually in the morning.

[fol. 225k-1] Q. Have you discussed the case with the people at the store or other people?

A. Well, it has come up several times. Yes, we have discussed it.

Q. Have people expressed opinions to you as to what the punishment should be?

A. I can't specifically remember anybody giving me their opinion on it. We just discussed it generally.

Q. Did you hear anybody or watch any television newscasts?

A. No.

Q. Do you remember seeing photographs in the Los Angeles Times——

A. Yes.

Q. —of the courtroom procedure in the Duncan case?

A. Yes.

Q. Did you see Mr. Gustafson's picture?

A. I don't recall that.

Q. How about Mr. Moya's here, did you see his picture there?

A. I can't recall actually seeing it, no.

Q. Well, the mere fact that Mrs. Duncan received the death penalty and Baldonado received the death penalty, does it necessarily follow to you that this man shouldn't receive the death penalty?

[fol. 225l-1] A. No.

Q. As a result of your discussions and reading about the case in the newspaper, have you, yourself, formed any opinion?

A. No, I haven't.

Q. As a result of people having expressed opinions to you, have you formed any opinion?

A. No, I haven't.

Q. Do you have any opinion whatsoever at this time?

A. No, I can't say an opinion. I knew he is guilty. That is an established fact.

Q. That is right. We're concerned with the penalty here.

A. No, I——

Q. He pleaded guilty long ago, and we are just concerned with the penalty here now.

A. I have no opinion on that.

Q. Do you know of any reason whatever why you couldn't serve as a fair and impartial juror?

A. No.

Q. Do you feel that in every case of a willful, deliberate and premeditated murder that the death penalty should be inflicted?

A. No, not necessarily.

Mr. Henson: We will pass Mrs. DeMarco for cause.

[fol. 225m-1] Mr. Gustafson:

Q. Mrs. DeMarco, you do not have, as I understand your answer to Judge Blackstock, you don't have any conscientious objections——

A. No, I don't.

Q. —against the infliction of the death penalty? You wouldn't require me to prove any particular things before you would return a death penalty, any more than you would require Mr. Henson to prove any particular things where you would require life imprisonment, would you?

A. No.

Q. You would be willing to accept Judge Blackstock's statement of the law, that whatever penalty you decide is the appropriate one is in your sole discretion?

A. Yes.

Q. Any reason why you couldn't give my side of the case a fair trial just as you would give Mr. Henson's side?

A. No, I haven't.

Mr. Gustafson: Pass for cause.

The Court: The peremptory is with the People.

Mr. Gustafson: I accept the jury as now constituted, your Honor.

The Court: All right, swear the jury.

Mr. Gustafson: Your Honor, would the Court decide whether to have an alternate before this jury is sworn, that is make a determination whether an alternate is necessary?

[fol. 225n-1] The Court: What do you think about it?

Mr. Gustafson: I would believe this case would last as long or longer than the Baldonado case, and on that basis, I think there should be at least one alternate.

The Court: Well, shall we just have one alternate?

Mr. Gustafson: Yes, we had one in the Baldonado case.

The Court: All right. Swear the jury first.

(The entire jury panel was sworn by the Clerk.)

The Court: All right, call another name for the alternate.

The Clerk: Mary F. Benson, B-e-n-s-o-n.

(Prospective alternate juror sworn by the Clerk.)

The Court: Mrs. Benson——

Prospective Juror: Yes, sir.

The Court: Do you have any conscientious scruples against inflicting the death penalty in a murder case?

Prospective Juror: No, sir.

The Court: All right.

Mr. Henson:

Q. Mrs. Benson, is there a Mr. Benson?

A. I am divorced.

Q. Do you have any children?

A. No, sir.

Q. Do you have an occupation?

A. I am a service representative for Pacific Telephone here in Ventura.

[fol. 225o-1] Q. Are you acquainted with any of the other jurors here?

A. No, sir.

Q. Do you know the District Attorney, Mr. Gustafson?

A. No, sir.

Q. Have you ever had an occasion to, in your duties as a service representative of the telephone company, to go to his office?

A. No, sir.

Q. Are you acquainted with any of the members of his staff?

A. No, sir.

Q. Have you—you live in Ventura?

A. Yes.

Q. Do you read the Ventura Star-Free Press?

A. Yes, sir.

Q. Have you read about the Olga Duncan murder case?

A. Yes, I have.

Q. Have you seen pictures of the defendant, here, Luis Moya, in the paper?

A. Yes.

Q. Have you seen pictures of the District Attorney?

A. I don't remember. Probably, if it was in the paper.

[fol. 225p-1] Q. Did you see photographs of the courtroom procedure, courtroom proceedings in the Elizabeth Duncan case?

A. I don't recall it.

Q. Do you recall reading any statements by the District Attorney about what penalty should be imposed before the case was ever presented to the Grand Jury?

A. Vaguely I recall it, but I don't remember the article itself.

Q. The fact that he is a public official here, making a public statement about a case that has not been presented to any judicial body, would that affect your judgment in the case?

A. No, sir.

Q. Have you heard television broadcasts about the case, newscasts?

A. One or two, yes.

Q. Did you see moving pictures of the courtroom in the Duncan case?

A. I think one of them was. I'm not sure.

Q. Did you discuss the case with other people?

A. Not discuss it, I mean it has been brought up. It hasn't been a general discussion at all.

Q. Have people expressed opinions to you as to what penalty should be imposed in this case?

A. Not in this case, no, sir.

[fol. 225q-1] Q. You're aware, you probably have read

in the Ventura Star-Free Press that Elizabeth Duncan received the death penalty?

A. Yes, sir.

Q. And that Augustine Baldonado received the death penalty?

A. Yes.

Q. The fact that they have received the death penalty, would that mean to you that necessarily this boy should also receive the death penalty?

A. Not at all.

Q. Do you have any opinions yourself at this time concerning what penalty should be imposed on this boy?

A. I lean slightly toward one, but it's not definite as an opinion. One side is more prevalent in my mind than the other.

Q. That leaning opinion, shall we say, is that going to affect your deliberation in this case?

A. I don't believe so, because it's nothing strong or definite at all.

Q. Well, would evidence coming from the witness stand, here, along the same lines sort of cause that opinion to lean over further?

A. Yes, unless there was other evidence to pull it back the other way.

Q. Would you require the defense, here, to cause that [fol. 225r-1] opinion to lean back the other way.

A. No. As I understand it, you're to give facts concerning the case, and I believe that if I know the facts of the case more thoroughly, that I would be able to give a fair judgment.

Q. Even though you do have an opinion, you feel that——

A. Yes, because——

Q. You feel that you could judge the case?

A. I think so, because there is nothing definite and nothing strong. It can be quite easily overriden.

Q. What I'm trying to get at, are you going to require me as defense counsel to override that opinion?

A. Yes. Well, I mean, one side or the other, yes.

Q. Well, if the Judge instructs you that neither side here has any burden of proof in the case, will you follow that instruction?

A. Yes, I could do that.

Q. If the Court instructs you that the question of whether this boy receives life imprisonment or death is a matter completely within your discretion, will you follow that instruction?

A. Yes, yes.

Q. And if the Judge instructs you that you're to decide this case strictly from the evidence presented from the [fols. 225s-1-1066] witness stand or evidence that has been admitted, will you follow that instruction?

A. Yes.

Q. In the event that you had a brother twenty years of age and seated in the same chair that this boy is, would you be willing to have twelve people in the same frame of mind that you're now in deciding whether he should be given life imprisonment or death?

A. Yes, I would.

Q. Having in mind that you have some kind of an opinion?

A. Yes.

Mr. Henson: Pass Mrs. Benson for cause.
Mr. Gustafson: Pass for cause.
The Court: The peremptory is with the People.
Mr. Gustafson: Pass peremptory.
The Court: The peremptory is with the defendant.
Mr. Henson: Pass peremptory.
The Court: Swear the alternate juror.

(Alternate juror sworn by the Clerk.)

The Court: All of the rest of this jury panel are excused whenever you want to go. We have a jury now.

[fols. 1067-1138] Ventura, California, Wednesday, April 29, 1959. 10:00 A.M.

* * * * * * *

[fol. 1139] INSTRUCTIONS OF THE COURT TO THE JURY

The Court: Ladies and gentlemen of the Jury, it becomes my duty as Judge to instruct you on the law as it pertains to this case, and it is your duty as jurors to follow the law as I state it to you.

You will not be required to return a verdict of guilty

or not guilty in this case. On January 29, 1959, the defendant, Luis Moya, appeared before this Court and withdrew his plea of not guilty to the charge of murder. By withdrawing his plea of not guilty to the charge of murder as charged in the Indictment, the defendant, Luis Moya, in legal effect pleaded guilty to the charge of murder as set [fol. 1140] forth in the Indictment.

Murder is the unlawful killing of a human being, with malice aforethough. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart.

Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal excuse or cause. It does not imply pre-existing hatred or enmity toward the individual injured.

You will not be required to make a finding as to the degree of murder of which the defendant, Luis Moya, stands convicted.

All murder which is perpetrated by means of poison or lying in wait, torture, or by any other kind of willful, deliberate and premeditated, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act or lewd and lascivious act upon the body of a child under the age of fourteen, is murder of the first degree, and all other kinds of murder are in the second degree.

When defendant, Luis Moya, appeared before this Court on January 29, 1959, and withdrew his plea of not guilty to [fol. 1141] the charge of murder as set forth in the Indictment, he admitted that the degree of murder was of the first degree in that it was willful, deliberate and premeditated within the legal definitions thereof.

On April 16, 1959, the defendant withdrew his plea of not guilty by reason of insanity, and pleaded guilty.

The law conclusively presumes that the defendant was legally sane at the time he committed the murder and is therefore legally responsible and punishable for his crime.

The only question before you in this case is what punishment should be imposed in the case of Luis Moya.

It is the law of this State that every person guilty of murder of the first degree shall suffer confinement in the State Penitentiary for life, or death, at the discretion of the Jury.

The law gives no preference as to the two alternatives, life imprisonment or death. In inflicting the penalty, you are entirely free to act according to your own judgment. Your discretion in selecting a penalty is in no way circumscribed by law. It is an absolute discretion. For example, there is no rule of law which calls for a sentence of death simply because you find that there are no mitigating or extenuating circumstances. Similarly, there is no rule of law which calls for a sentence of life imprisonment because you find that there are no aggravating circumstances. In other words, you will be called upon to [fol. 1142] select the alternative punishment which, upon view of the whole case, is just and wise, in your opinion. However, neither penalty attaches automatically until you as the Jury, have unanimously agreed upon your choice of punishment and have designated that punishment in your verdict.

With respect to the penalty, no burden of proof is cast upon the prosecution or on the defendant to show, by any particular form of evidence, which penalty should be imposed by you.

The law does not impose a death penalty, leaving discretion with the Jury to substitute a lesser penalty. It imposes neither death nor life imprisonment but, with a perfectly even hand, presents the two alternatives to the Jury.

The Legislature, perhaps because of the very gravity of the choice, has formulated no rules to control the exercise of the Jury's discretion.

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence, or who may appear to have more knowledge of the matters in question, may appear to have some knowledge of the matters in question. Nor is the prosecution or the defense required to produce as exhibits all objects or documents that

have been referred to in the testimony, or the existence of which may have been suggested by the evidence.

[fol. 1143] In this case you must decide whether the defendant, Luis Moya, shall be punished by life imprisonment or death, separately from co-defendants Elizabeth Duncan and Augustine Baldonado. Whatever penalty or punishment, if any, may have been imposed upon those defendants is of no concern of his, of no concern of yours. There is no rule of law which requires that joint defendants shall be punished equally. The exercise of your discretion to impose one of the alternative penalties, life imprisonment or death, is not circumscribed in any way by any judgments of this Court which may heretofore have been rendered in the cases of the co-defendants, Elizabeth Duncan and Augustine Baldonado.

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which jurors lawfully may base their findings and opinions, whether favorable to the prosecution or to the defendant.

One type of evidence is known as direct, and the other is circumstantial. The law makes no distinction between the two classes.

Direct evidence of a person's conduct at any time in question consists of the testimony of every witness who, with any of his own physical senses, perceives such conduct or any part thereof, and which testimony describes or relates what thus was perceived.

All other evidence admitted in this case is circumstantial in relation to which conduct—in relation to such conduct, [fol. 1144] and insofar as it shows any act, statement, or other conduct, or any circumstance or facts tending to prove by reasonable inference any given issue in the case, may be considered by you in arriving at your verdict.

After a prisoner has been sentenced to prison and delivered to the Department of Corrections of this State of California for placement in a state penal institution, the Division of the Adult Authority has the responsibility for determining and redetermining the length of time that a prisoner shall be actually confined.

The term of imprisonment shall not exceed the maximum nor be less than the minimum term of imprisonment provided by the law for the public offense of which such person was convicted.

The Adult Authority is composed of seven members and appointed by the Governor with the advice and consent of the State Senate. The chairman of the Adult Authority is designated by the Governor from time to time. The law provides that persons appointed to the Adult Authority should have a broad background in and ability of appraisal of the offenders and the circumstances of the offense for which convicted.

The law also provides that, insofar as practicable, the members of the Adult Authority shall be selected who have a varied and sympathetic interest in correction work, including persons widely experienced in the fields of correc- [fol. 1145] tions, sociology, law, law enforcement, and education.

After a prisoner has been sentenced by a court and delivered to a designated penal institution of the Department of Corrections for placement, the prisoner is under the custody and control of the Department of Corrections until such time as the prisoner is released from confinement.

The Director of Corrections has adjudication—has jurisdiction over the California State Prison at San Quentin, the California State Prison at Folsom, the California Institution for Men at Chino, the California Institution for Women at Corona, the Dual Vocational Institution at Tracy, the California Medical Facility at Vacaville, the California State Prison at Soledad, and the California Medium Security Prison now temporarily located near San Luis Obispo.

The supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined there are vested in the Director of Corrections.

The Director of Corrections is appointed by the Governor with the advice and consent of the State Senate.

The Director of Corrections, according to law, shall have wide and successful administrative experience with adult or youth correctional programs embodying rehabilitative concepts, and the Director of Corrections is a member of the Governor's Council.

The Director of Corrections shall cause such persons [fol. 1146] committed to a state prison to be examined and studied. This includes investigation of all pertinent circumstances of his life and the antecedents of the viola-

tion of law because of which he has been committed to prison. Any person may be re-examined to determine whether existing orders and disposition should be modified or continued in force. Upon the basis of the examination and study, the Director of Corrections is responsible for classifying prisoners and determining the prison in which such prisoner shall be confined.

The Director of Corrections is charged with providing facilities for personal and psychiatric and diagnostic clinics and such branches thereof as may be required, at one or more of the state prisons or institutions under the jurisdiction of the Department of Corrections. The work of the clinics shall include the scientific study of each prisoner, his career and life history, the cause of his criminal acts, and recommendations for his care, treatment, and employment, with the view to his reformation and to the protection of society.

A prisoner imprisoned under a life sentence is committed and delivered to the Department of Corrections for placement in a state penal institution.

The Adult Authority has authority to grant parole to a prisoner imprisoned under a life sentence. However, no prisoner imprisoned under a life sentence may be paroled by [fol. 1147] the Adult Authority until he has served at least seven calendar years from the time of his actual delivery to a state penal institution. This does not mean that a person imprisoned under a life sentence is automatically released from confinement and placed on parole after he has served seven calendar years in a state penal institution. This does not mean that a person imprisoned under a life sentence has any legal right to be released on parole after having served seven calendar years in a state penal institution. A prisoner imprisoned under a life sentence may be lawfully confined in a penal institution for the remainder of his natural life.

Until granted parole by the Adult Authority, the prisoner under a life sentence shall remain confined within a legal institution under the custody and control of the Director of Corrections.

In considering a parole for a prisoner imprisoned under a life sentence, the Adult Authority shall consider all statements and recommendations which may have been submitted by the Judge, District Attorney and Sheriff, and

recommendations of other persons interested in the granting or denying of such people.

The Adult Authority shall enter on its order granting or denying parole to such prisoner in fact that such statements and recommendations have been considered by the Adult Authority. Such statements and recommendations shall be and remain confidential.

[fol. 1148] At least 30 days before the Adult Authority shall meet to consider the granting of a parole to any prisoner under a life sentence, the Adult Authority must send written notice thereof to the Judge of the Superior Court before whom the prisoner was tried and convicted, and to the District Attorney and to the Sheriff of the County from which the prisoner was sentenced.

The Adult Authority shall have full power to suspend, cancel, or revoke any parole without notice, and to order returned to prison any prisoner upon parole.

The written order of any member of the Adult Authority shall be a sufficient warrant for any peace or prison officer to return to actual custody any conditionally released or paroled prisoner.

The Governor of the State shall have like power to revoke the parole of any prisoner. The written authority of the Governor shall likewise be sufficient to authorize any peace officer to retake and return said prisoner to the State Prison. His written order revoking the parole shall have the same force and effect and be executed in like manner as the order of the Chairman of the Adult Authority.

The Governor shall have power to grant reprieves, pardons, and commutations of sentence after conviction for all offenses except treason and impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may [fol. 1149] be provided by law relative to the manner of applying for pardon.

The Governor shall communicate to the Legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime for which he was convicted, the sentence, its date, the date of the pardon or reprieve, and the reasons for granting the same.

Neither the Governor nor the Legislature shall have the power to grant pardon or commutation of sentence in

any case where the convict has been twice convicted of felony, unless upon the recommendation of a majority of the Judges of the Supreme Court.

The Supreme Court of the State of California consists of the Chief Justice and six Associate Justices.

In the case of a person twice convicted of felony, the application for pardon or commutation of sentence shall be made directly to the Governor, who shall transmit all papers, records and documents relied upon, in support of and in opposition to the application, to the Adult Authority.

When an application is made to the Governor for pardon or commutation of sentence, or an application has been referred to the Adult Authority, he or it may require the Judge of the court before whom the conviction was had, or the District Attorney by whom the action was prosecuted, to furnish him or it, without delay, with a summarized statement of the facts proved on the trial and of any other facts having reference to the propriety of granting or refusing [fol. 1150] said application, together with his recommendation for or against the granting of the same and his reasons for such recommendation.

In the case of applications of persons twice convicted of felony, the Adult Authority, after an investigation, shall transmit its written recommendation upon such application to the Governor, together with all papers filed in connection with the application.

No application which has not received a recommendation from the Adult Authority favorable to the applicant shall be forwarded to the Clerk of the Supreme Court, unless the Governor, notwithstanding the fact that the Adult Authority has failed to make a recommendation favorable to the applicant, especially refers an application to the Justices for their recommendation.

In all cases where the Adult Authority has made a recommendation favorable to the applicant, and in those cases referred by the Governor notwithstanding an adverse recommendation, the application, together with all papers and documents relied upon, in support of and in opposition to such application, including prison records and recommendation of the Adult Authority, shall be forwarded to the Clerk of the Supreme Court for consideration of the Justices. If a majority of the Justices recommend that clemency be granted, the Clerk of the Supreme Court shall

transmit the application, together with all papers and documents filed in the case, to the Governor. Otherwise, [fol. 1151] the documents shall remain in the files of the Court.

Judgment of death shall be executed within the walls of one of the state prisons designated by the Court by which judgment is rendered.

The punishment of death shall be inflicted by the administration of a lethal gas.

The People and the defendant both are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all of the evidence in the case, to determine, if possible, whether the defendant, Luis Moya, should be punished by life imprisonment or by death. When you have reached a conclusion in that respect you should not change it merely because one or more or all of your fellow-jurors may have come to a different conclusion, or merely to bring about a unanimous verdict. However, each juror should freely and fairly discuss with his fellow-jurors the evidence and the opinions which he has based upon the evidence. If, after doing so, any juror shall be satisfied that a conclusion or opinion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to his final decision.

At times throughout the trial, the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings, and are [fol. 1152] not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given to such evidence, nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same.

As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

If, in these instructions, any rule, direction, or idea is stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you

are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

The Court has endeavored to give you instructions embodying all the rules of law that may become necessary in guiding you to a just and lawful verdict. The applicability of some of these instructions will depnd upon the conclusions you reach as to what the facts are. As to any such instruction, the fact that it has been given must not be taken as indicating an opinion of the Court that the in-[fol. 1153] struction will be necessary or as to what the facts are.

If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction.

The Jury are the sole and exclusive judges of the effect and value of the evidence addressed to them, and of the credibility of the witnesses who have testified in the case.

The term "witness" includes every person whose testimony, under oath, has been received as evidence, whether by examination here in court or through deposition.

The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, that is, whether or not they have spoken the truth. The Jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, his interest in the case, if any, or his bias or prejudice, if any, for or against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or by contradictory evidence. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial; and a witness may [fol. 1154] be impeached also by proof that he has been convicted of a felony.

A witness willfully false in one material part of his or her testimony is to be distrusted in others. The Jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point. If you are

convinced that a witness has stated what was untrue as to a material point, not as the result of mistake or inadvertence but willfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all, unless you shall be convinced that he or she has, in other particulars, sworn to the truth.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind as against the declarations of a lesser number or a presumption or other evidence which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence.

Duly qualified experts may give their opinions on ques-[fol. 1155] tions in controversy at this trial, to assist you in deciding such questions. You may consider the opinion, with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion if you find it to be unreasonable.

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious.

Remember that you are not partisans or advocates but, rather, judges. The final test of the quality of your service will lie in the verdict which you return to the Court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper

verdict in this case. To that end, the Court reminds you that, in your deliberations in the jury room, there can be no triumph excepting the ascertainment and declaration of the truth.

Upon retiring to the jury room, you will select one of [fol. 1156] your number to act as Foreman—it may be either a man or a woman—who will preside over your deliberations and who will sign the verdict to which you agree.

In order to return a verdict, it is necessary that all twelve of the jurors shall agree to the decision. As soon as all twelve of you have agreed upon a verdict, you shall have it signed by your Foreman and dated, and then return with it to this room.

I have had prepared the appropriate forms of verdict for your convenience. If and when you arrive at a verdict, you will have the Foreman fill in the proper form and return with it to this room.

Swear the officers.

(Officers for the jurors and alternate juror were duly sworn by the Clerk.)

The Court: All right. You may retire.

(Whereupon, at 2:45 o'clock p.m., the Jury retired to consider its verdict.)

(Whereupon at 5:40 p.m. the jury returned to the courtroom and the following proceedings were had:)

The Court: All right, ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman of the Jury: No, we haven't your Honor.

The Court: All right. What do you want?

The Foreman of the Jury: We would like to hear the [fols. 1156a-1160] transcript of Mr. Moya on the witness stand and the transcript of Dr. Harvey read.

The Court: Have they both been transcribed?

The Reporter: Dr. Harvey's testimony has been transcribed. The other reporter is bringing down the testimony of Mr. Moya. Shall I start reading the testimony of Dr. Harvey?

The Court: Yes.

The Reporter: Is is all right if I read Dr. Harvey's testimony from the transcript?

Mr. Gustafson: Yes.

Mr. Henson: Yes.

(Whereupon, the entire testimony of Dr. David R. M. Harvey was read to the jury.)

The Court: As I understand it, you want the testimony of the defendant Moya read tonight, is that right?

The Foreman of the Jury: Yes, your Honor.

The Court: You want all of that testimony?

The Foreman of the Jury: That is what we decided on.

The Court: Well, how many of the jury want to go to dinner?

(No response from the jury.)

The Reporter: It will take a long time to read it. It is many hours.

The Court: Mr. Bailiff, take this jury to dinner and bring them back here as soon as they get through.

[fol. 1161] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

v.

LUIS MOYA, Defendant and Appellant.

OPINION—Filed March 11, 1960

Defendant and Augustine Baldonado were indicted jointly with Elizabeth Duncan for the murder of her daughter-in-law, Olga Duncan. Defendant pleaded guilty to murder in the first degree, and upon a trial by jury on the sole issue of penalty, his punishment was fixed at death. His motion for a new trial was denied, and the appeal

comes to us automatically under subdivision (b) of section 1239 of the Penal Code.[1]

A motion for a change of venue made by defendant on the ground that a fair and impartial trial could not be [fol. 1162] had in Ventura County was denied. In addition to the matters urged in People v. Duncan, ante, p. ——, defendant relied on the assertedly adverse effect of the publicity given to the Duncan and Baldonado trials, which had preceded his own. We are of the opinion that he has not pointed to anything warranting a conclusion different from the one reached in the Duncan and Baldonado cases, where we held that the trial court did not abuse its discretion in refusing to order a change of venue. (People v. Duncan, ante, p. ——; People v. Baldonado, post, p. ——.)

Defendant, who was born in 1938 in San Angelo, Texas, was provided with a good home by his parents but was in trouble at an early age. He has used narcotics consistently since he was eleven years old. At twelve, he was frequenting houses of prostitution and started on a course of criminal conduct which extended until the commission of the crime in question. His past offenses have included theft, burglary, possession and smuggling of narcotics, and stabbing a person with a knife. He served several terms in jail and at least one in the penitentiary. He was not a cooperative prisoner and made several attempts to escape. His work record was "very spotty," and he had been "kept" by various women.

[fol. 1163] A few days after defendant was arrested, he asked to see a minister, and Reverend Floyd K. Gressett came to the jail in response to a call from a police officer. Defendant testified that when he talked to Reverend Gressett he got on his knees and for the first time in his life asked God to forgive him. Reverend Gressett decided that defendant was sincere and was ready to confess to God and man. Immediately thereafter defendant confessed to law enforcement officers that he murdered Olga. He testified that he believed he had been forgiven, that his religious

[1] Separate trials were given to Mrs. Duncan and Baldonado, and their punishment was also fixed at death. (See People v. Duncan, ante, p. ——; People v. Baldonado, post, p. ——.)

feeling had increased, and that he was sorry he had killed Olga.

A psychiatrist, Dr. David R. M. Harvey, testified that defendant is a sociopathic personality who profits neither from experience nor punishment, is a constant danger to society, and is capable of murder "right now." Dr. Harvey said that a sincere religious belief is a good start toward rehabilitation, but that the period of time during which defendant held such belief was too short to permit a determination as to the validity of his conversion.

A tape recording of defendant's confession was played at the trial, and he contends that it was error to receive this evidence without a preliminary finding that the confession was free and voluntary. Defendant had pleaded [fol. 1164] guilty, and after the recordings were put in evidence he testified that the statements contained therein were true. In these circumstances he suffered no prejudice by reason of the failure to make a preliminary determination as to the voluntariness of his confession.

Defendant called Phillip W. Thatcher to testify as an expert with respect to the relationship between the acceptance of religion and the likelihood of rehabilitation. Thatcher had served two prison terms and while confined had accepted Christian principles. Since his release in 1941 he had devoted his life to working toward the rehabilitation of young boys in penal institutions and "Youth for Christ" camps. Defendant offered to prove that as a result of Thatcher's experience and conversations with defendant he believed that defendant had undergone a religious conversion similar to his own and that because of defendant's acceptance of the Christian religion he believed there was a good chance that defendant could be rehabilitated. The court did not err in excluding Thatcher's testimony. The effect of religious conversion upon rehabilitation is not a matter sufficiently beyond common experience that the opinion of an expert is required to assist the trier of fact. Moreover, Thatcher's testimony would have added little to the [fol. 1165] evidence before the jury. Defendant testified as to the effect of his religious conversion, and Reverend Gressett said that in his opinion defendant was sincere in the acceptance of religious beliefs. Dr. Harvey declared that a sincere religious belief constituted a good start and

that defendant had at least an average chance for rehabilitation.

For the purpose of showing defendant's remorse and his state of mind after the offense, he offered in evidence four tape recordings made during the period between his asserted religious conversion and the trial. One was of a conversation held by him with the news director of a radio station, and the others were of his conversations with persons engaged in religious work. The recordings were obviously self-serving. Moreover, defendant was permitted to testify concerning his remorse and his beliefs at the time of the conversations. Objection to this evidence was properly sustained.

There was no abuse of discretion in admitting over defendant's objections three photographs showing Olga's body covered with a thin layer of dirt and lying in a shallow grave. The photographs were far less gruesome than the facts of the killing and burial of Olga as recited by defendant.

[fol. 1166] The trial court properly excluded evidence, including a motion picture, offered to show how the death penalty is administered. The jury was instructed that the punishment of death is inflicted by means of lethal gas, and no useful purpose would have been served by presenting all the details to the jury.

The prosecution was permitted over defendant's objection to elicit the testimony of an officer of the State Board of Corrections that nearly 50 per cent of all prisoners released on parole have their paroles suspended within three years. This was error. The parole records of individuals convicted of felonies other than murder are inadmissible in the penalty trial of a defendant found guilty of first degree murder. (People v. Purvis, 52 Cal. 2d 871, 885-887.) The witness was also permitted to testify, over defendant's objection, that a murderer sent to a penal institution at Vacaville had killed another inmate. This testimony was irrelevant and immaterial, and defendant's objection should have been sustained. However, we have concluded, after an examination of the entire record, that the judgment must be affirmed since it does not seem reasonably probable that in the absence of the errors a result

more favorable to defendant would have been reached by the jury. (Cal. Const., art. VI, § 4½.)

[fol. 1167] The judgment and the order denying the motion for a new trial are affirmed.

Gibson, C. J.

We Concur: Traynor, J., Spence, J., McComb, J., Peters, J., White, J.

I Concur in the Judgment: Schauer, J.

[fol. 1168] IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Crim. No. 6491

PEOPLE

v.

MOYA

March 10, 1960.

ORDER DENYING REHEARING—Filed April 5, 1960

Appellant's petition for rehearing Denied.

Gibson, Chief Justice.

[File Endorsement Omitted.]

[fol. 1169] SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1959

Nos. 1071 Misc., 1074 Misc., and 1075 Misc.

AUGUSTINE BALDONADO, Petitioner,

vs.

CALIFORNIA;

LUIS ESTRADA MOYA, Petitioner,

vs.

CALIFORNIA; and

ELIZABETH ANN DUNCAN, Petitioner,

vs.

CALIFORNIA

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI
June 27, 1960

On Petitions for Writs of Certiorari to the Supreme Court of the State of California.

On Consideration of the motions for leave to proceed in forma pauperis and of the petitions for writs of certiorari, it is ordered by this Court that the motions to proceed in forma pauperis be, and the same are hereby, granted; and that the petitions for writs of certiorari be, and the same are hereby, granted limited to the following questions:

1. Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?

2. Was there a violation of petitioner's right to a fair trial, as guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, where in a trial of a capital offense by jury, the trial court permitted to remain in the jury box and sit in judgment, three jurors who had entered the jury box fixed

[fol. 1170] opinion as to petitioner's guilt, and retained such opinions while being examined on voir dire?

The cases are transferred to the appellate docket as Nos. 1045, 1046, and 1047 and are consolidated with a total of three hours for oral argument.

The orders of Mr. Justice Douglas of June 10, 1960, staying the execution of the death sentences are continued pending the issuance of the mandates of this Court.

And it is further ordered that the duly certified copy of the transcripts of the proceedings below which accompanied the petitions shall be treated as though filed in response to such writs.

June 27, 1960.

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PETITION NOT PRINTED

Office Supreme Court, U.S.
FILED
MAR 24 1961
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 186

LUIS ESTRADA MOYA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 186

LUIS ESTRADA MOYA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

The Opinion Below

The Opinion of the California Supreme Court is reported at 53 C. 2d 819; 3 Cal. Rptr. 360, 350 P. 2d 112 (Tr. 365).

Jurisdiction

The Opinion of the California Supreme Court was entered on March 11, 1960 (Tr. 361). The petition for writ of certiorari was filed on June 10, 1960, and was granted on June 27, 1960 (Tr. 366), 363 U. S. 840.

Question Presented

Was petitioner's right to the trial guaranteed by the Due Process Clause of the XIV Amendment violated in view of the conduct of the District Attorney, the resulting publicity, and the other circumstances under which the trial was held?[1]

Constitutional Provisions and Statutes Involved

Pertinent provisions of the Constitution of the United States are as follows:

Amendment XIV, Section 1: "Nor shall any state deprive any person of life, liberty or property, without due process of law."

The pertinent provisions of Section 190 of the California Penal Code provide as follows:

> "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the Court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1 . . ."

The pertinent provisions of Section 190.1 of the California Penal Code provide as follows:

> "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative the death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon

---

[1] *Moya* v. *California*, 363 U. S. 840 (1960) (Tr. 366). The second question certified for review does not involve this petitioner.

be further proceedings on the issue of penalty, and the trier of facts shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the Court or jury trying the issue of fact on the evidence presented and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of eighteen years at the time of the commission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by the Court sitting without a jury, the trier of facts shall be the Court. If the defendant was convicted by a plea of guilty, the trier of facts shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact on the issue of penalty and the issue of sanity, if any, shall be the same jury unless, for good cause shown, the Court discharges that jury, in which case a new jury shall be drawn to determine the issue of penalty, or the issue of sanity or both such issues, as the case may be.

"On such further proceedings on the issue of penalty, any evidence concerning the commission of the crime admissible in the trial determining the guilt of the defendant may be admitted."

Pertinent provisions of Section 1033 of the California Penal Code provide as follows:

"A criminal action may be removed from the Court in which it is pending on application of the defendant, on the ground that a fair and impartial trial cannot be had in the county."

Pertinent provisions of Section 1034 of the California Penal Code provide as follows:

"The application for removal must be made in open court, and in writing, verified by the affidavit of the defendant, a copy of which application must be served upon the District Attorney at least one day prior to the hearing of the application. At the hearing the District Attorney may serve and file such counter affidavits as he may deem advisable."

Pertinent provisions of Section 1035 of the California Penal Code provide as follows:

"If the Court be satisfied that the representations of the applicant are true, an Order must be made transferring the action to the proper Court at some convenient county free from a like objection."

Pertinent provisions of Section 1076 of the California Penal Code provide as follows:

"In a challenge for actual bias, the cause stated in the second subdivision of Section 1073 must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, circulars, or other literature, or common notoriety; provided, it appear to the Court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him."

Statement of Facts

Petitioner Moya, age 20, was arrested on December 13, 1958, and was incarcerated from December 13, 1958 through December 30, 1958. Without benefit of legal counsel, petitioner was interrogated daily by law enforcement officers concerning his knowledge of the disappearance of Olga Duncan. Petitioner was not taken before a magistrate or afforded legal counsel until December 30, 1958.

Co-defendant Baldonado was arrested shortly after petitioner and was incarcerated and interrogated by law enforcement officers concerning the disappearance of Olga Duncan, without benefit of legal counsel and without appearance before a magistrate.

Elizabeth Duncan was arrested on or about December 15, 1958, and incarcerated in the Ventura County Jail on charges relating to her obtaining a fraudulent annulment between her son, Frank Duncan, and Olga Duncan.

At all times mentioned herein, Ventura County had a total population of approximately 170,000, which was rural in background and character. The two main cities were Ventura and Oxnard, each with a population of roughly 30,000 to 40,000. There were two daily newspapers published in Ventura County, The Ventura County Star-Free Press, hereinafter called Star Free Press, and the Oxnard Press Courier, hereafter called Press Courier. Ventura County is situated directly south of Santa Barbara County and directly north of Los Angeles County. Daily newspapers of Los Angeles County and Santa Barbara County had circulation in Ventura County including the Santa Barbara News Press, the Los Angeles Times, the Los Angeles Examiner, the Los Angeles Herald Express, and the Los Angeles Mirror News.

Immediately after the arrests, public news media reported events of the case in a sensational and dramatic manner. News media reports concerning the case largely emanated from the District Attorney and associated law enforcement officers. The following are summaries and extracts of some of the pertinent publications:

Exhibit 11-A, Star Free Press, December 16, 1958.

"LEAD SOUGHT IN BIZARRE PLOT"

"FAKE ANNULMENT CHARGE JAILS THREE; NURSE IS MISSING".

Front page photographs were published of Olga Duncan in a nurse's uniform with the caption, *"Miss Olga Duncan—Where Is She?"* A photograph of petitioner and of co-defendant Baldonado appeared with that of Olga Duncan on the front page. The article contained the following:

"Officers desperately are seeking new leads today in the disappearance of a beautiful Santa Barbara nurse on November 17 and are holding a man on suspicion of kidnapping and her mother-in-law on charges of faking an annulment. . . . Also in custody in Santa Barbara for questioning is Luis Estrada Moya, 22, Santa Barbara, a paroled convict. . . . In jail in lieu of $50,000 bail is Mrs. Elizabeth Duncan, 54, who has admitted to officers that she impersonated her daughter-in-law on August 7 and hired a young man named Ralph to impersonate her son in obtaining an annulment. Investigators said that she doesn't know the whereabouts of Ralph—that he was just a man she hired to help her in the ruse. . . . Investigators would not say why the probe into the fake annulment and the disappearance of Olga Duncan had gone on so long without an

earlier arrest. Investigation began in mid-October. Olga disappeared a month ago."

Exhibit 12, Star Free Press, December 17, 1958.

"AUTHORITIES FEAR ATTRACTIVE NURSE FOUL PLAY VICTIM"

The article contained the following:

"Authorities in Santa Barbara now are convinced that Olga Duncan, attractive thirty year old nurse and wife of attorney Frank Duncan, met with foul play. District Attorney Vernon Thomas said today that any hope of finding her alive is dwindling. . . . Investigating officers at Santa Barbara said that there was only one ray of hope to indicate Olga Kupczyk Duncan might be alive. It was discovered yesterday that there were several pieces of luggage missing from her apartment at 1114 Garden Street, Santa Barbara, where she was last seen November 17. It was previously thought the only items missing from her apartment were the nightclothes she was believed to be wearing. . . . It was added, too, that Frank Duncan, who had lived with her in the apartment only occasionally, had come and gone from the apartment several times since she was reported missing. Police have since changed the lock on the door to prevent further visits. . . . Investigating officers said that although Baldonado is not currently charged with participating in the Duncan case, it has been established that he and parole violator Luis Moya, 22, Santa Barbara, were in contact with the elder Mrs. Duncan prior to the disappearance of Olga. . . . It was the landlady at the apartment house where Olga lived who provided the information that the pretty nurse, an expectant mother in January, was deeply afraid of her mother-in-law. The landlady, who asked not to be identified, also said the elder Mrs. Duncan had stated

on one occasion that she would kill her daughter-in-law rather than have her son live with her.

"In Benito, Manitoba, railroad section foreman Elias Kupczyk, father of the missing woman, said his daughter wrote often to complain that she was afraid of her mother-in-law and that the older woman would come to the apartment where she lived and revile her. . . . Investigating officers in Santa Barbara said their fears of foul play mounted with reports from Olga's landlady that the young woman was deathly afraid of her mother-in-law. The landlady said the elder Mrs. Duncan frequently came to the apartment of her son's wife and Olga told the landlady that she feared for her life each time Mrs. Duncan came. It was thought for a while that Olga might have fled from her apartment and gone into hiding to escape from the woman she feared, but the length of her disappearance now leads authorities to believe she was forcibly taken from her apartment."

Exhibit 13, Star Free Press, December 18, 1958.

"EX-CONVICT SOUGHT FOR ROLE IN DUNCAN FAKE ANNULMENT"

"D.A. Says Man Posed As Lawyer"

The article contained the following:

"A felony complaint was issued today for Ralph Winterstein, a twenty-six year old ex-convict, on charges of forgery and perjury as the man who had impersonated a Santa Barbara attorney here on August 7th to obtain a false annulment. District Attorney Roy A. Gustafson praised the work of his investigators in identifying the new personality in this complicated web of events in the disappearance of thirty year old Olga

Kupczyk Duncan, wife of twenty-nine year old attorney Frank Patrick Duncan. Upon issuance of the complaint, Gustafson made the revelation that contrary to earlier information he did not know of the fake Duncan-Kupczyk annulment until November 20, three days after the disappearance of Olga from her Santa Barbara apartment. . . . Gustafson said he was not given the names until a month earlier: 'I feel very strongly' Gustafson said, 'that there might not have been any disappearance (of Olga Duncan) had we been able to move on the case in October.'."

"From attaches at St. Francis Hospital in Santa Barbara, from police, a doctor, and from Duncan himself, his romance and courtship of Olga could be traced. . . . Investigators say this is a possibility, but add that the situation could also be more tragic. Folks in the area have been alerted to watch for her body in the sea. The possibility of homicide was voiced yesterday in court by Gustafson as he opposed bail reduction on Elizabeth Duncan."

"Since 1949, investigators' reports show, she was married five times. (Referring to Elizabeth Duncan.) Three of the marriages ended in annulment, two in divorce."

The article then went on to recite the specific instances of the prior marriages and divorces and annulments of Elizabeth Duncan.

Exhibit 14, Star Free Press, December 19, 1958.

"KEY WITNESS IN DUNCAN CASE REVEALED"

"Case of Fake Annulment: Key Witness Gives DA Valuable Information"

The article described how Emma Short had come to the District Attorney's office in Ventura, giving information.

"A voluntary key witness in the fake annulment proceedings in Ventura August 7th has made valuable information available to District Attorney's investigators, it was reported today, and the witness is remaining in an undisclosed location. District Attorney Roy A. Gustafson said that Emma Short, an 82 year old Santa Barbara woman, has given information to his investigators concerning the trip she made with Mrs. Elizabeth Duncan to Ventura to obtain an annulment in the names of her son, Frank, and his wife, the missing 30 year old nurse and expectant mother, Olga Kupczyk Duncan. Mrs. Short, Gustafson said, has provided important information in the case and expressed her desire to have her whereabouts kept a secret. 'We are assisting her in doing so', Gustafson said."

"Other information on Mrs. Duncan's past has been coming into the hands of authorities since her arrest last Saturday. It has been found she has been married to at least five men since 1950 and has been divorced or the marriages annulled. 'She has been through enough annulment proceedings', Gustafson said, 'to have known that what she obtained here August 7th was not a legal annulment'."

"In San Francisco the police vice squad identified Mrs. Duncan as Betty Duncan Coghill who was arrested May 11, 1953, in a Sutter Street massage parlor where she acted as a hostess. At that time an agent of the vice squad posed as a customer and Mrs. Duncan asked him if he wanted a girl and took him to the back room where he was asked for a ten dollar fee. Mrs. Duncan was found guilty of soliciting, given a thirty day suspended sentence, and placed on one year's probation, police records show."

Exhibit 15, Star Free Press, December 20, 1958.

In reporting the filing of kidnap-murder charges against Elizabeth Duncan, Augustine Baldonado, and petitioner, the following appeared: "The case, which if written as fiction would be rejected by any editor as too improbable, entered this new phase with the testimony of a Santa Barbara cafe owner, Mrs. Esperanza Esquivel, who operates the Tropical Cafe, 431 State Street." The article in a dramatic and spectacular way described the manner in which the police had ordered the repairing of a street excavation job in front of Olga's apartment halted but that excavation and search of a body apparently will wait until Monday.

The article contained the following:

> "On December 4th, Elizabeth had Moya arrested in Santa Barbara on charges he was extorting money from her. Presumably this was the pay-off money. . . . In all, she is supposed to have paid Moya and Baldonado $3,000.00 for the killing. . . . The men paid $25 to rent a car in which bloodstains were found and returned a gun they had borrowed in damaged condition. On the latter point, police theorized that they struck Olga with the gun. They believe she was kidnapped while preparing for bed on the 9th."

Exhibit 3, Star Free Press, December 22, 1958.

"OLGA'S BODY FOUND IN COUNTY; NURSE WAS BEATEN, STRANGLED."

Pictures of the location of the victim's body appeared on Page 1 captioned as follows: "*Shallow hand-scooped grave —Sheriff-Detective Ray Higgins stands beside shallow Casitas Pass grave that held body of pretty Canadian nurse Olga Duncan and her unborn child. Dotted line indicated grave.*" There was published a photograph of Olga Duncan

captioned *"Struggled for life."* A photograph of Baldonado was captioned: *"Leads Way to Grave."* A photograph of Elizabeth Duncan was captioned: *"Smiles When Told Body Found."* A dramatic recitation of a confession of Baldonado appeared in the front page article:

"District Attorney Roy A. Gustafson said he will present the case to the Grand Jury Friday seeking indictments on charges of murder. . . . The woman had been pistol whipped, beaten repeatedly with a wrench, and strangled. . . . It was learned that she was lured to her death when she thought she was needed to help a man who was injured or ill. Moya is reported to have tricked her into thinking that 'his friend in the car' needed help. Although seven months pregnant and said by her doctor to be in a state of near shock from fear and worry, she put on a robe to see if she could give aid. . . . Since that time, the bizarre story has developed of a strange attraction of mother for son. Gustafson said he believed that motive for the hired killing was jealousy. The elder Mrs. Duncan flew into a rage when Frank Patrick Duncan, attorney with a prominent Santa Barbara law firm, married Olga. In letters to parents and relatives, Olga revealed that on her wedding night Mrs. Duncan threatened her life. For the next several months, information from Olga's letters and her reports to her physician indicated that she lived a nightmare. Mrs. Duncan harassed her continuously, the girl reported to friends and relatives. . . . Gustafson said he has evidence to indicate that Mrs. Duncan had previously tried to hire the killing of her son's wife. He would not elaborate, but said 'This is not the first time that Mrs. Duncan tried to have her (Olga) killed'. . . . Gustafson said the unusual case will be his first opportunity to try a case under the three

phase law he authored. The case he said, provided he obtains a Grand Jury indictment of the trio, will be tried in three steps. First the suspects will be tried to determine guilt, then to determine penalty, and finally to determine sanity. There is the possibility that since Olga was carrying a child of more than five months that authorities will consider the case double homicide. Gustafson talked to Mrs. Duncan last night in the County Jail. No disclosures were made as to the content of the discussion. He said today that the case has been developed as the result of outstanding police work on the part of investigators in his office and the Sheriff's Department. . . . The break in the case came yesterday morning when Ray Higgins, investigator for the Ventura County Sheriff's office, resumed questioning of Baldonado. . . . 'We were discussing the case and his involvement', he said 'when he jumped up and said "I'll do it for my kids" and started talking'. . . . This is the story Baldonado told:"

Thereupon, it was reported in detail in a spectacular way, the confession of Baldonado in substance being that Mrs. Elizabeth Duncan had hired him, Baldonado, and Moya to murder Olga Duncan. Following the recitation of the confession, there was a recapitulation of the case including a statement by Gustafson with reference to Frank Duncan: "Yesterday Gustafson said, 'He (Frank Duncan) asked us to put up or shut up.' Well, we put up." In the same issue of the Star Free Press, the district attorney released a written statement:

"D. A. URGES DEATH TERM IN KILLINGS"

"The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders in the face

of these events can seriously contend that the death penalty is not appropriate punishment for the perpetrators of such a crime. Many persons contend that the death penalty does not deter murder. Frankly, I am sick of this illogical argument. Of course, penalties do not completely deter drunken drivers, burglars, robbers, or other criminals and death penalties do not completely deter murderers, but that is no reason to dispense with penalties."

"Retaliation is a basic instinct of the human race. In civilized societies, the government takes over from the individual the job of retaliating against a wrong-doer. From biblical times, a life for a life has been recognized as just and fair."

"The alternative in California, a life sentence which permits a prisoner to be paroled within 7 years simply is insufficient retaliation. I hope the people of this State rise up against the propaganda drive that has flooded us lately about the so-called evils of capital punishment. They must demand that California retain the death penalty to deal with situations such as the Duncan case."

Exhibit 16, Star Free Press, December 23, 1958.

"HUSBAND OF SLAIN NURSE MISSING, SOUGHT BY D. A."

"A subpoena has been issued for Frank P. Duncan, 29 year old Santa Barbara attorney and husband of murdered Olga Kupczyk Duncan, seeking his appearance before the Ventura County Grand Jury on Friday. District Attorney Roy A. Gustafson said the subpoena for Duncan was issued yesterday but that efforts thus far to locate him have not been successful. . . . Gustafson said he is preparing his presentation for the Grand

Jury Friday and will call 'maybe a dozen' witnesses. He indicated some of the principals in the case would appear, including Mrs. Duncan, Augustine Baldonado, 25 year old confessed killer of Olga Duncan; Mrs. Esperanza Esquivel, Santa Barbara, who reportedly introduced Baldonado and Luis E. Moya to Mrs. Duncan; Mrs. Emma D. Short, Santa Barbara, who accompanied Mrs. Duncan and Ralph Winterstein to Ventura August 7th to obtain a fake annulment of the Duncan-Kupczyk marriage. Mrs. Esquivel and Mrs. Short both had at their own request been hidden out for the past several days. Gustafson said there will be other witnesses, including the coroner, investigating officers, and some persons yet unnamed. Moya, 22 year old narcotics suspect, arrested on suspicion of parole violation, yesterday was transferred from Santa Barbara to Ventura County Jail. He was booked on the same charges here. Moya was named by Baldonado as the man who went to the apartment of Olga Duncan the night of November 17th and brought her to a waiting car. Baldonado has stated that Moya struck her with a gun, strangled her, and helped dig a shallow grave into which she was dumped, possibly still alive. . . . Gustafson said he discounted the blackmail claim and observed that as far as he was concerned the only reason Moya and Baldonado sought money from Mrs. Duncan was because 'they wanted the pay they were promised for the job they did' . . . Gustafson also commented on a report out of Santa Barbara that Baldonado had confessed nine days ago to the murder, 'There is no truth to the report that Baldonado confessed nine days ago', Gustafson said. . . . A coroner's autopsy report issued yesterday by Virgil Payton listed the cause of Olga's death as asphyxiation. The death could have been caused by

strangulation or suffocation, Payton said, posing the possibility that she was buried alive."

The December 23rd issue published a feature story on co-defendant Elizabeth Duncan:

"What's Mrs. Duncan Like?
She's Calm, Cool, Unruffled Prisoner."

"Mrs. Elizabeth Gold Coghill Gillis Sasso Satrano Sollene Nigh Duncan, much married 54 year old Santa Barbara 'housewife' is a very calm, unruffled prisoner in the Ventura County Jail . . . "

Exhibit 17, Star Free Press, December 24, 1958.

"OLGA'S DAD CLAIMS BODY"

"Nurse's Father in Visit to Ventura".

The article reported that the father of Olga Duncan had come to Ventura to claim the body of Olga Duncan.

"The daughter, Olga Kupczyk Duncan, was found in a shallow grave in Casitas Pass Sunday afternoon where she was buried, possibly alive, November 18. . . . Duncan is being sought as a witness in the inquiry into the death of his wife. No suspicion is directed at him in the case. 'He may have had knowledge of some of the facts in the case', Gustafson said, 'but he is not a suspect'. . . . Young Duncan had informed Gustafson that that date he had intended to waive a preliminary hearing and enter a plea on her behalf. Sullivan said that he does not plan to enter a plea at that time on behalf of Mrs. Duncan and will instead ask for a preliminary hearing. Gustafson said that if this occurs he will ask for a continuance. The District Attorney said he will need time to prepare his case on the fake annulment if Sullivan chooses to fight it. Mrs. Duncan

has admitted her part in obtaining the annulment in which she impersonated Olga and hired a man, identified as Ralph Winterstein, 26, to impersonate her son.

"In the meantime, Gustafson is busy reading through reams of reports prepared by Santa Barbara police, Sheriff's Officers, and FBI in the early investigation of the Duncan matter. He said his Christmas holidays will be spent analyzing and digesting these thousands of words and preparing for the Friday presentation to the Grand Jury. Reportedly subpoenaed in Santa Barbara to appear before the Grand Jury Friday are Frank Haywood, operator of the Blue Onion Cafe. It is alleged that Mrs. Duncan left with him an envelope containing money for Luis Moya, one of the murder for hire suspects. Also subpoenaed was Sarah Contreras, owner of a car rented to Moya and Augustine Baldonado and in which Baldonado has told authorities he and Moya went to Olga's apartment and carried her away to her death. Another witness said to be subpoenaed was James Chico Roho in Santa Barbara County Jail on a traffic charge who allegedly joined with Charles Cordero, 17, in furnishing a gun to Moya and Baldonado."

The publications in newspapers were paralleled in a spectacular way by television broadcasts as evidenced by the following:

"TV NEWSCASTER JOLTS GUSTAFSON—AND HIS WIFE".

"There was a sudden shock experienced in the household of District Attorney Roy A. Gustafson last night. He and his wife were watching television when commentator Clete Roberts closed a newscast on the current Duncan murder case by saying 'and on Friday the

District Attorney will go before the Grand Jury and seek a murder indictment against Mrs. Gustafson'. Mrs. Gustafson is said to have leaped from her chair and asked 'Wha-a-a-a-t?'. Today a telegram from Roberts arrived on the desk of Gustafson apologizing for the inadvertent but breathtaking error."

Exhibit 18, Star Free Press, December 26, 1958.

"MOYA ADMITS HE KIDNAPPED NURSE"

A front page photograph of petitioner and co-defendant Baldonado was captioned *"Partners—Luis Moya Talks with Augustine Baldonado, with whom he is charged with the kidnap-killing of attractive nurse Olga Duncan."* The article contained the following:

"Moya today admitted to the Grand Jury that he and Baldonado were hired for the job by Mrs. Elizabeth Duncan, mother-in-law of the slain girl, with a $6,000 price tag . . . District Attorney Roy A. Gustafson said he got word of the confession about 1:30 this morning, an hour and a half after Moya 'broke' under questioning by Deputy Sheriff Ray Higgins. . . . Gustafson gave full credit to Higgins for obtaining the confession and remarked that it was too bad that under the County's Civil Service personnel system a man of that ability was rated only as Deputy I, lowest on the pay scale. The District Attorney's investigator, Clarence Henderson, said that he had questioned Moya and was getting nowhere. 'I told Higgins to take over alone because I seemed to be hindering more than helping with Moya. He got the job done', Henderson said. . . . Moya reportedly told about the same story as Baldonado of the murder. Gustafson said the confession revealed the pair had driven to the apartment of Olga on November 18th and that Moya had gone to the door, telling the attractive nurse that her husband,

Frank, from whom she was estranged, was in the car and wanted to talk to her. . . . Gustafson said he had to remake his plans for a Grand Jury hearing at the last minute. . . . Moya then went before the Grand Jury and Gustafson told reporters that the youth testified on matters contained in his confession. Other witnesses were to be called this afternoon but Gustafson did not say whether he would now have to call all of the ones he previously had planned to question. . . . Duncan, the District Attorney pointed out, is not being questioned as a suspect, but as a witness to some of the activities which preceded the murder of his wife. . . . Baldonado has confessed participation in the kidnap slaying, and says he was hired with Moya by Mrs. Duncan, according to Gustafson."

"The murder case, one of the most bizarre in Ventura County history, has been top headline news of the State and Nation for more than one week. . . . Gustafson now had all three central figures in the slaying case in jail, but not as suspects in a murder. All were booked on other charges. Mrs. Duncan as a suspect in a fake annulment scheme, Moya as a parole violator, and Baldonado on failure to provide. This allows Gustafson to call all before the Grand Jury in the inquisition into Olga's murder. As defendants they could not be called. Now they must either testify or state their reasons which can only mean fear of self-incrimination."

Exhibit 5, Star Free Press, December 27, 1958.

"THREE INDICTED IN DEATH PLOT"

"Grand Jury Acts After One Day Probe".

"Deliberating only fifteen minutes after the final witness was heard, the Ventura County Grand Jury last night

indicted Mrs. Elizabeth Duncan, 54, and two confessed hired killers for the murder November 18th of Olga Kupczyk Duncan. . . . Although (Frank) Duncan himself remained in the hall of the court house's fifth floor with his attorney and a small regiment of newsmen and photographers, most of the other witnesses asked for more seclusion. They were kept in other parts of the court house until called for questioning and were then brought to the jury chambers via stairways, other offices, and back doors in an effort to avoid the clicking, flashing cameras. It was the reported confession of Moya early yesterday morning that appeared to clinch the indictments and swing the balance of evidence for the District Attorney. Baldonado had early confessed but Moya remained adamant until about midnight when he talked to Sheriff's office investigator Ray Higgins. Higgins, a 40 year old ex-torpedoman in the Navy, now retired, became a local hero in the proceedings when he obtained a confession despite the fact that he failed an examination for promotion recently and is the lowest paid deputy."

Exhibit 9, Star Free Press, December 29, 1958.

"HEART ATTACK SENDS MRS. DUNCAN TO HOSPITAL".

The article reported that Mrs. Elizabeth Duncan had had a heart attack and was taken to the Ventura County Hospital and returned to a cell.

"The doctor said there was no indication of a heart attack and placed Mrs. Duncan in a ward for observation. Because the only ward in the hospital for security is the psychiatric ward, Mrs. Duncan was placed there. She reportedly said she would rather be back in jail

than in the 'psycho' ward and was returned to her cell. . . . District Attorney Roy A. Gustafson this morning said that Mrs. Duncan's illness may have been real but added that 'this is a trick used by many persons in jail on a serious charge. It is known that suspects fake illnesses to get into a hospital where there is a chance for escape'. He said he recognized also that at a hospital there is an opportunity to obtain drugs and sleeping pills."

The article then reported that Mrs. Elizabeth Duncan had taken an overdose of sleeping pills in 1956 in Santa Barbara at which time Olga Duncan was her nurse and that is the method by which Frank Duncan and Olga Duncan became acquainted, and eventually married. The article described the funeral in Ventura of Olga Duncan and the reactions of the parents of Olga Duncan:

"Kupczyk buried his head in his hands and sobbed audibly at the mention of his daughter's name. Mrs. Kupczyk, first notified of her daughter's death by a Canadian newspaper, collapsed and has been hospitalized since that time."

"The nine hours of testimony before the Grand Jury is being transcribed by court reporters and stenographers. It will make a report of more than 250 typewritten pages it was reported. Persons who had an opportunity to see some of the material observed that it contained 'almost unbelievable information' of mystery thriller character."

"Gustafson said that he has received reports of written threats received by persons in Santa Barbara who have been questioned about the case. He said threats of bodily harm were made but that he doesn't know

whether this was the work of cranks or if the threats came from someone who might be involved in some way in the murder for hire case. Now that a Grand Jury indictment has been returned in the case, no further effort will be made to question Mrs. Duncan, it was stated by District Attorney's investigators."

Exhibit 9, Star Free Press, December 29, 1958 (editorial).

"DOING THE DIRTY WORK FOR THOSE NEIGHBORS"

"If the people of our demure neighboring Santa Barbara County are planning any more weird and revolting crimes, we hope they'll stage them on the home grounds. Ventura County's peace officers, prosecutors, courts and grand juries have enough to do looking after our own not inconsiderable malefactions without having to solve and handle such unbelievable and savage mysteries as lately have been dumped over our borders from the north. At least it appears likely at this writing that justice will be done in the case of these unwanted intruders. The facts indicate that some very competent police work has been accomplished by Ventura County investigators and there is fair prospect that in due time the strange assortment of barbarous characters involved will, one by one, meet up with his or her just deserts. Somebody certainly violated practically every rule, law, and ordinance of God and humanity in the course of the sordid sequence that is now under official review. The law requires that persons charged with crimes shall be deemed innocent until proven guilty and that being so, we shall deem those presently accused until the day the court pronounces its verdicts. In the interest of neighborly relations, we shall hope

that there will never be a next time and, second, that should there be another such crime, the community of origin will have to clean up its own frightful mess."

Exhibit 27, Press Courier, December 29, 1958 (editorial).

"THE DEATH PENALTY"

"The Grand Jury returned indictments on Friday in a case that has deeply shocked the whole state, the brutal killing of a blameless pregnant young woman. The utter callousness of this crime, the fumbling way in which the cruel deed was carried out, the stupidity that marked the conception and execution of the foul plot are extremely shocking. How many more people are there, one wonders, living in our county, who are capable of such a crime?

"District Attorney Gustafson last week used this crime as the text for a little sermon about capital punishment. We think his words are worth repeating and pondering. 'The brutal, calculated, revolting killing for hire of Olga Duncan is one of a number of horrible crimes which have recently been committed in California. I simply cannot understand how some of our leaders, in the face of these events, can seriously contend that the death penalty is not an appropriate punishment for the perpetrators of such a crime. Many persons contend that the death penalty does not deter murder, but frankly, I am sick of this illogical argument. Of course, penalties do not completely deter crime, jail sentences do not completely deter drunken drivers, burglars, robbers, or other criminals, and death penalties do not completely deter murderers—but that is no reason to dispense with penalties. Retaliation is a basic instinct of the human race. The alternative in

California, a light sentence which permits a prisoner to be paroled in seven years, simply is insufficient retaliation. I hope the people of this state rise up against the propaganda and drivel that has flooded us lately about the so-called evils of capital punishment. We must demand that California retain the death penalty to deal with situations such as the Duncan case.'

"Perhaps the time will come when society will have found a way to deter, through intelligence and other tests, the probable criminal and find a way to care for him and perhaps cure him, before he can make innocent persons the victims of his evil nature. But that time is far into the future. Until it has arrived, until we know that tests of youngsters will prove out those who must, for their own and society's good, put safety to one side, we dare not dispense with capital punishment. This whole nation, and indeed the world of free men, is depending upon the power of retaliation to prevent another world war. We have the weapons and have made it clear that we will use them, in any sneak attack that is made upon us. Those retaliatory weapons are the atomic bombs and warheads which any rash aggressor knows will rain upon his nation, killing men and women and children by the thousands, perhaps by the millions. Perhaps this will not deter the warmakers. But we have pinned our faith in our nation's safety upon them. If the nation can do this, the state can hold out certain retaliation of society through the death penalty, is the price the calloused murderer will pay for his taking an innocent life."

Exhibit 8, Star Free Press, December 30, 1958.

Front page photographs were published of petitioner and co-defendants being arraigned before Judge Blackstock.

"LURID MURDER PLOT BARRED IN TRANSCRIPT".

"Secret Testimony Tells of 'Hiring'".

The article pointed out that at the precise moment that the arraignment was called, 9:30 A.M., private funeral services were being conducted across town for the victim, Mrs. Olga Duncan. In describing the arraignment, it was reported:

"Later, however, when photographers tried to get her (Elizabeth Duncan) to pose with Baldonado and Moya, she struggled with deputy Mary Forgey in the hall. The trio finally lined up, whereupon Baldonado was heard to say (to Elizabeth Duncan): 'What's the matter, you ashamed of what you've done?' . . . An overflow crowd was in the courtroom for the arraignment including many representatives of the Los Angeles press. Television cameras whirred during the court proceedings. Arraignments are generally handled by a Deputy District Attorney but Gustafson appeared in person for this one. He told reporters there is still a missing witness in the case. He said the witness, a woman, whom he refused to identify, was supposed to appear before the Grand Jury last week, but failed to show. A contempt citation has been issued, he said."

"ROY GUSTAFSON EXPLAINS WHY HE WILL ASK DEATH PENALTY FOR DUNCAN MURDER TRIO."

"'When you catch 'em and when you do convict 'em, what are you going to do with them. . . . rehabilitate them?' According to District Attorney Roy A. Gustafson, the chances of rehabilitating the three persons arraigned today on charges of murder for hire are 'awfully slim . . . and I don't want to take that kind of chance.' That is one of the reasons why he is

going to ask for the death penalty against Mrs. Elizabeth Duncan and her two accused accomplices, Augustine Baldonado and Luis Moya, in the hired slaying of Nurse Olga Duncan. Gustafson repeated his plans yesterday and added that he expected the case would probably be mentioned when the new legislative campaign opens this year to do away with the death penalty. . . . But he believes that the Duncan case and other torture sex slayings attributed to confessed killer Harvey Glatman of San Diego County will deter a number of legislators from voting for abolition during the coming legislative session. . . . The most pertinent part in the death penalty is retribution. Anyone who says we must get away from the 'barbaric though' of retribution is not being realistic. Retribution, he says, is one of the four major points in any punishment. Another is deterrence, a third is rehabilitation. Rehabilitation statistics are 'pretty sad', he says. And any alternative to capital punishment usually involves life sentences without pardon or parole. A life without hope of ever leaving prison 'has no hope and becomes a vegetable. Or worse as we'll show you later'. But as far as rehabilitation goes, Moya was paroled a year ago after serving a year out of a one to ten year term for marijuana possession. Gustafson says Moya was using marijuana when he was arrested in the Duncan murder case. By the state's own figures, 48.5 per cent of parolees would end up back in prison or jail within four years of being paroled. In the case of women, the rate was 57.5 per cent. And the rate is going up, not down, he points out. Still, he says, 'It's a goal worth pursuing. But I think you have to be choosey about the people you are willing to take chances on.'

"Fourth on Gustafson's list of points in punishment is protection of society. And he says, 'You can say a life term protects society outside of prison. But what does it do inside? Even the warden who favors doing away with the death penalty still wants to have it kept in prison killings. These people could kill guards and each other and know that they already had the worst possible penalty. And remember, there is always the chance that someone could let him out or he could escape or the law could be changed to let him go free.'

"The death penalty, he says, 'will not deter all crimes, but it will certainly keep murder to a minimum. Look what it did to kidnapping! The Lindbergh Law is a prime example', Gustafson says, 'of society solving a criminal problem. Prior to it, kidnapping had been a fairly common crime. In order to solve crime problems', says the District Attorney, 'you must have "certainty of apprehension, certainty of conviction, and certainty of adequate punishment." The Lindbergh Law has all three.'

"In that light, why would anyone commit murder? 'They think they won't get caught', he answers. 'Lots of them aren't caught. Lots of them think even if they are caught and convicted, they won't be executed.' He noted that statewide, only 57% of those who contest criminal court cases are convicted.

"He comments that the possibility of putting California's third woman in the gas chamber does not present him with any qualms. 'This is appropriate punishment', he said, paraphrasing the judge in the Harvey Glatman case. And he adds, 'What are you going to do, rehabilitate 'em?'"

Exhibit 30, Los Angeles Times, December 22, 1958.

"BRIDE'S BODY FOUND; KILLING ADMITTED"

"Body of Missing Bride Unearthed. Man Confesses, Points to Grave; May Have Been Buried Alive."

In the article following was a vivid description of the confession of Baldonado and the discovery of the body.

"Officers hinted that Mrs. Olga Duncan may have still been alive when she was placed in the grave which Baldonado said he dug with his bare hands . . . Payton said Mrs. Olga Duncan's unborn child was more than five months in gestation and therefore had to be listed as a second death. The District Attorney was quoted as stating: 'I was tired of waiting for somebody to do something with this case, so I ordered my men to question Baldonado' . . . Two key witnesses in any prosecution against the three persons have been spurted to undisclosed hiding places at their request, police reported . . . Last night police discussed the possibility of placing a guard with her (Mrs. Esquivel) although they emphasized that she is not under arrest or in custody. . . . Santa Barbara police disclosed tonight that they had known of the murder plot since December 12, when they were told of it by Mrs. Emma Short . . . Santa Barbara police said Mrs. Short claimed that her life was in danger if Mrs. Elizabeth Duncan knew she talked to police."

Exhibit 31, Los Angeles Times, December 23, 1958.

"BLACKMAIL CHARGED IN BRIDE SLAYING".

"Gustafson virtually pledged himself to seek the death penalty for the trio in a statement he issued to reporters in support of capital punishment. In the statement he called the murder of the pretty Canadian nurse 'brutal,

calculated, revolting killing for hire'. The Olga Duncan slaying, Gustafson said, 'is one of a number of horrible crimes which have been committed in California. I simply cannot understand how some of our leaders in the face of these events can seriously contend that the death penalty is not appropriate punishment.' The people of California, Gustafson said, 'must demand the death penalty to deal with such situations as the Duncan case.'

"In Los Angeles, Police Chief Parker revealed that lie detector tests given to important witnesses in the police crime laboratories there more than a week ago helped to break the case. Parker said Mrs. Emma Short, 84, of Santa Barbara, was taken to Los Angeles December 12 and under the questioning of J. A. McAllister, polygraph technician, 'told quite a story'. Mrs. Short, a friend of the elder Mrs. Duncan . . . revealed the name of Mrs. Esperanza Esquivel, Parker said. Mrs. Esquival, Santa Barbara cafe operator, was given a lie detector test December 14 and disclosed that Mrs. Duncan had asked her to help find someone who would get rid of her daughter-in-law, that she introduced Mrs. Duncan to Moya and Baldonado, that they rented the kidnap car from Mrs. Sarah Contreras, Parker revealed. Mrs. Short and Mrs. Esquival have been secreted away at their own request."

Exhibit 32, Los Angeles Times, December 31, 1958.

An article reported:

"Gustafson, declaiming that he 'wouldn't stipulate to anything but the death penalty' for all defendants, estimated it will be about six weeks before the trial can get under way. The testimony given in secret before the Grand Jury last Friday and made public today,

painted an almost unbelievable picture of a possessive mother so agitated over losing her son's affection to another woman that she would stop at nothing to prevent it."

Exhibit 1, Press Courier, January 7, 1959.

A courtroom scene was described as follows:

"In a packed courtroom, Mrs. Duncan clearly said 'not guilty to the charge'. Her attorney, S. Ward Sullivan of Los Angeles, added a plea 'not guilty by reason of insanity' and a throng of courtroom spectators groaned. . . . The crowd which had begun gathering before noon and had overflowed into the hallway, murmured as the proceedings started. . . . People were wedged in the aisles and along the walls of the courtroom. Outside the courtroom, they jammed the hallway, blocked doorways and spilled over into stairways. Some were standing on benches to get a better view during the rare moments when the courtroom door would open and they could peek in. . . . Handcuffs were placed on Mrs. Duncan. A few minutes later she, Moya and Baldonado were led back to their cells, through the back door of the court and out a rear door to prevent any turmoil."

Exhibit 2, Los Angeles Examiner, January 7, 1959.

It was reported that a courtroom crowd numbered 1,000 persons, that the crowd was "hostile" and that "a middle-aged woman aimed a smashing blow at her (Elizabeth Duncan) with her purse".

Exhibit 28, Press Courier, December 31, 1958.

"MOYA TELLS HOW NURSE DIED, SCREAMING AND STRUGGLING".

Below this was an editor's note: "Printed below is a continuation of the testimony of Luis Moya, 20, of Santa Barbara,

before the Ventura County Grand Jury December 26. In the parts of the transcript printed in yesterday's Press Courier, Moya testified . . ." The entire page of the newspaper was then taken up with the transcript of petitioner's testimony along with photographs of him.

On January 13, 1960, petitioner moved for change of venue on grounds that a fair and impartial trial could not be held in the County of Ventura within the meaning of Section 1033 of the Penal Code of California. The motion was supported by affidavits from responsible persons residing in the County of Ventura who had opportunity to learn of public opinion. Each verified the widespread prejudice against petitioner caused by the news media publicity and published statements of the District Attorney and other law enforcement officers. The affidavits represented that even school children were familiar with the case, that petitioner and co-defendants had been referred to in vile and profane terms, that opinions were stated suggesting that the lynch law should be applied and that petitioner's counsel was subjected to ridicule for his representation of petitioner. Newspaper exhibits were presented to the trial judge as evidence of public feeling and as evidence of the manner and scope of the publicity attending the case. The motion for change of venue was taken under submission.

On January 13, Judge Blackstock set the trial for petitioner and co-defendants for February 16, 1959, approximately 30 days hence. Counsel for co-defendant Baldonado moved for a continuance because of pending cases, which motion was summarily denied by Judge Blackstock with the comment to counsel for co-defendant Baldonado, "I have never known you to be quite that busy before" (Tr. 110).

On January 15, 1959, Judge Blackstock denied the motion for change of venue with the comment, "It is a sad com-

mentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this county" (Tr. 137). This comment was published in the Star Free Press, in the January 15, 1959 (Exhibit A-2).

On January 20, 1959, petitioner moved for a continuance on the grounds that counsel had insufficient time to prepare for trial. This motion was summarily denied by Judge Blackstock (Tr. 151).

Exhibit A-39, Star Free Press, January 19, 1959.

"FBI ARRESTS DUNCAN CASE MISSING MAN"

"The missing figure in the Olga Duncan case has been found"

Exhibit A-3, Star Free Press, January 20, 1959.

Ralph Winterstein was pictured in handcuffs in a front page photograph with a headline "EXTRADITION OF WINTERSTEIN SOUGHT BY D.A."

An editorial was published explaining why certain letters to the editor had not been published:

"Some letters that come to the editor from our readers did not appear in the Vox Pop column. There have been a few, lately, for instance, expressing opinions about issues in a pending murder trial. Their publication, we think, would plainly tend to prejudice prospective jurors and very well might get the writer and probably the editor, too, into contempt of court and difficulties."

Exhibit A-8, Star Free Press, January 23, 1959.

"DUNCAN TRIAL ATTRACTS WIDE PRESS COVERAGE".

"Newspapers as far away as England want to cover the Duncan murder trial which starts in Ventura County Superior Court February 16 . . . County Clerk-Recorder Bob Hamm said the Hollywood correspondent of the London Daily Mirror is among ten news media representatives who so far have requested space. . . . He said he has no idea how many newspapers, magazines, radio and TV stations. A special press room is being set up in the back of the County Clerk's office and as many media as desire may have their own special phones installed. . . . There has been no special lighting in the courtroom, Judge Blackstock said, but a couple of banks of lights which have been kept dark in recent years may be turned on for the benefit of photographers. There will be no 'live' radio or TV broadcasts of the trial, Judge Blackstock ruled . . ."

Exhibit A-4, Star Free Press, January 29, 1959.

Trial Judge Blackstock, rather than attempting to minimize the publicity of the case, appeared to openly encourage it. Press photography was permitted during each court session, and photographs of the court sessions preliminary to trial were published. On January 29, 1959, petitioner withdrew his plea of not guilty, and a trial on his penalty and sanity was set for April 20. This proceeding was given immense publicity, under the headline: "MOYA ADMITS NURSE'S MURDER".

Exhibit A-7, Star Free Press, February 14, 1959.

"DUNCAN TRIAL STARTS MONDAY"

The article contained a recapitulation of the case and published the following:

"District Attorney Roy A. Gustafson is expected to try to show a fiercely jealous Mrs. Duncan hired killers because she wanted her lawyer son, Frank, for herself. It is this facet of the case, the relationship between mother and son, which has resulted in much of the national publicity. Metropolitan newspapers and magazines have alluded to Sidney Kingsley's Pulitzer Prize winning play, 'The Silver Cord' in discussing the case. This is a drama of an unnaturally close relationship of mother and son".

"D.A. TO PROSECUTE DUNCAN CASE ALONE: SEEKS DEATH PENALTY".

Under a photograph of the District Attorney, the article contained among other things the following: "The Duncan Case will make the third time Gustafson has asked a Ventura County Jury for the death penalty. The other two times, juries gave him what he asked, although only one defendant was executed. Gustafson's office has consistently been at or near the top statistically."

"PRESS READY TO TURN OUT FOR DUNCAN MURDER TRIAL".

"The Press will be out in force Monday when the Duncan Murder Trial begins in Judge Blackstock's Superior Court. . . . As of yesterday morning, County Clerk-Recorder Bob Hamm had reservations from 15 news media for 25 photographers and reporters to be on hand. . . . Special phones were being strung in a back room of the Clerk's Office yesterday which will function as a Press Room throughout the trial. Newspapers, radio and TV stations and newswire services who have indicated they will send one or more people are the following: Ventura County Star Free Press;

Oxnard Press Courier; the local radio stations KVEN, KUDU, and KACY. The four Los Angeles Metropolitan newspapers, Times, Examiner, Herald Express and Mirror News; London, England, Daily Mirror; San Francisco Chronicle; Santa Barbara News Press; United Press International; Los Angeles Radio Station KFWB; Los Angeles Television Station KTLA."

Exhibit A-9, Star Free Press, February 16, 1959.

The Elizabeth Duncan Trial commenced on February 16, 1959, in the atmosphere described in by headline: "BIG CROWD JAMS DUNCAN TRIAL". The issue also published an article concerning Judge Blackstock celebrating his 83rd birthday.

Exhibit A-40, Star Free Press, February 18, 1959.

Press and television coverage of the Elizabeth Duncan Trial was very great and added much spectacular to the case. Witnesses were photographed by still and moving cameras while testifying on the witness stand, attorneys were photographed in questioning of jurors and witnesses and in argument and even Judge Blackstock was photographed. This only served to magnify and intensify the public prejudice as evidenced by the report: "Before going back to her cell after Court had adjourned, Mrs. Duncan told reporters of some of the mail she had been receiving. She said she got 15 to 20 threatening letters, most of them signed and some containing real bad pictures. One, she said, showed a person hanging from a tree and another showed someone sitting in the electric chair, she said."

The articles were generally laudatory of the District Attorney as evidenced by the above wherein five separate pictures were published side by side of the District Attorney with captions underneath reading as follows: "Working

with his hands for emphasis, District Attorney Roy Gustafson takes his turn at quizzing prospective murder trial jurors". The above also reported: "Before the 4th day of the trial started this morning, Mrs. Duncan showed the press a newspaper clipping on which threats had been scrawled . . . among the remarks written in red ink on the paper was 'I could cut your throat' and 'You should have died before you were born' . . . Mrs. Duncan said the newspaper clipping was received by her son, Frank, yesterday. Other remarks included: 'Sap Mama's Boy' and 'Hope you hang, you - - - - -.'" There were also published descriptions of the questioning of jurors on voir dire examination and the various challenges: "In each instance where Gustafson has opposed Sullivan's challenge of a juror, the challenge has been denied by Judge Blackstock."

Exhibit A-16, Star Free Press, February 26, 1959.

The Courtroom was jammed to capacity each day of the Elizabeth Duncan trial with lines of people waiting outside to get into the courtroom. The above published a photograph of petitioner testifying in the Elizabeth Duncan case with a headline:

"FRANK DUNCAN WEEPS AS
OLGA'S KILLING DESCRIBED"

An article reported:

"Repeatedly yesterday, Sullivan made legal objections to the admission of testimony and in some cases the entire testimony of some witnesses. Mostly, he was over-ruled by Judge Blackstock. Several times, the audience was heard to titter when Judge Blackstock made his rulings . . . Again yesterday, rope restrained the crowd and seats were at a premium. Some sat through the two-hour lunch period to assure themselves seats for the afternoon recess . . . After Sullivan made

a protest, the Court ruled that Mrs. Duncan is no longer to be handcuffed when in the presence of jurors."

Exhibit A-50, Star Free Press, March 10, 1959.

The tenor of the courtroom crowd and the community was well described in the above: "This morning, when entering the courtroom, Frank Duncan strolled tight-lipped by the line of spectators waiting to get into the courtroom. There were calls of 'Yoohoo, Frankie', 'Mama's Boy', and 'Going up to see Mama, Frankie?' . . . Defense Counsel S. Ward Sullivan lost his bid for a mis-trial late yesterday, for the first time since the trial opened four weeks ago, the audience broke into handclapping when Judge Blackstock announced his decision."

Exhibit A-51, Star Free Press, March 11, 1959.

The following was reported:

"Again yesterday there were big crowds in the courtroom corridors. United Press International interviewed Mrs. Edna Westbrook and Mrs. Dorothy Clark, both of Oak View (Ventura County), who said they had come to the courtroom at 3:30 a.m. to be first in line. Many persons reportedly breakfasted in the corridors while waiting for the 10:00 a.m. opening of Court."

Exhibit A-54, Star Free Press, March 16, 1959.

On March 16, 1959, the Elizabeth Duncan jury went out to deliberate following arguments. The district attorney released the following written statement to the press:

"GUSTAFSON EXPLAINS 'BAD LIGHT'".

"(Editor's Note: District Attorney Roy A. Gustafson issued the following statement concerning his summa-

tion of the Duncan murder trial. Summation was reported in the Star Free Press Saturday.)

"During the argument of the Duncan case last Friday, March 13, 1959, I made a statement which put Judge E. Perry Churchill and Hal Hammons, Jr., in a bad light to those who did not know all of the facts. I want to state the facts fully so that people of Ventura County will realize that their actions were reasonable under the circumstances.

"'On October 15, 1958, Mr. Hal Hammons made a full disclosure to Judge Churchill of the facts of the fraudulent annulment secured by Mrs. Elizabeth Duncan in the name of her son, Frank. Judge Churchill advised Mr. Hammons that the matter should be reported to me immediately. Mr. Hammons came to my office that same day and disclosed all of the case to one of my deputies except the names of the people involved. Mr. Hammons stated the facts as an actual case and not as a hypothetical case. He stated that he was concerned about his obligation to maintain the secrecy of confidential communications given to him as a lawyer, and for that reason he did not want to disclose the names at that time.

"'About the same time I saw Judge Churchill, and he asked if Mr. Hammons had reported the matter to me. I replied that he had, but that he had not given me the names. Judge Churchill stated that the fraud had apparently been perpetrated by the mother of a young Santa Barbara lawyer and that the young lawyer had been in to see Judge Churchill shortly before. Judge Churchill had advised the young man to see the District Attorney. The Judge wanted to know whether the young man had seen me, and I replied that he had not. We discussed Mr. Hammons' problem concerning

confidential communications, and I informed Judge Churchill that I had not yet had an opportunity to research the point. The Judge suggested that the young lawyer involved, as an officer of the Court, and in the interests of his own reputation, should be interested in bringing his mother before the Court, and that perhaps the requirements of justice would be served in the event of such a voluntary appearance, if the mother were punished for contempt of Court. Judge Churchill suggested that perhaps the young lawyer should be given an opportunity.

"'I discussed the suggestion with Mr. Hammons on the telephone, and he said he would try to get in touch with the young lawyer to see if the lawyer would bring his mother in. We also discussed whether Mr. Hammons was obliged by legal ethics to withhold the names from me, and while I told him that I thought he had no duty to do so, I said I had not researched the point but I would try to do so. Before he was able to reach Frank Duncan, Mr. Hammons left on vacation and nothing further was done by Mr. Hammons, Judge Churchill, or me.

"'From the information I had, I could probably have ascertained through investigation who the young lawyer was. However, I felt that I should not do this when the proposed procedure seemed reasonable. I further thought that if the contemplated contempt of Court procedure occurred, the facts might indicate that the punishment there imposed would be adequate.

"'I learned the names of the attorney and mother on November 20, 1958, from a Santa Barbara source. I immediately called Judge Churchill and Mr. Hammons and informed them that I no longer felt bound not to proceed with a criminal investigation. Mr. Hammons

and Judge Churchill fully cooperated in the ensuing investigation.

"'In my argument last Friday I used the word "ashamed" with reference to the actions of some judges and lawyers. I intended to and should have said that I regret, as I am sure they do, that the procedures actually allowed a delay during which the after-events proved Mrs. Duncan was actually conspiring to take the life of her daughter-in-law.

"'I sincerely hope that this statement will receive as wide publicity as my remarks during my argument so that the erroneous impression which I gave will be erased.'"

The Star Free Press then published an "extra" on the verdict of guilty stating that it was the first "Extra" edition since V-J Day in 1945. It was reported:

"Reporters raced along the corridors and the crowd of spectators milled for seats. . . . When Peacock (Court Clerk) pronounced the fateful words Guilty of Murder in the first degree a stir and something like a sigh ran through the courtroom, which was nearly filled with spectators. . . . District Attorney Roy A. Gustafson said: 'If I didn't believe her guilty, I wouldn't have prosecuted her'."

Exhibit A-55, Star Free Press, March 18, 1959.

Referring to the trial of Mrs. Elizabeth Duncan, the following was reported:

"He (Gustafson) noted that the guilty verdict returned Monday maintained his record of never having failed to convince a jury of the guilt of a defendant in the 20 or so jury trials that he has handled personally."

Exhibit A-36, Star Free Press, March 21, 1959.

"MRS. DUNCAN TO DIE"

"District Attorney Roy A. Gustafson hailed the verdict and said it should have an effect on heading off moves to abolish the death penalty in California."

Coinciding with a headline in the Ventura County Star Free Press of March 23, 1959 (Exhibit A-58), "DUNCAN SANITY HEARING EXPECTED TO BE BRIEF", the District Attorney published a description of the trial record of the District Attorney during the year 1958 with a headline on page 1 as follows: "D.A. CONVICTION RATE HITS 97.7 PERCENT ON FELONIES".

Petitioner was referred to consistently throughout the Elizabeth Duncan trial and was a witness. He was consistently referred to as a "Confessed killer" or "Killer for hire", and petitioner and two defendants were referred to as "A Murder Trio". The publicity of the Elizabeth Duncan trial continued until the time she was actually sentenced to death on April 3, 1959.

Exhibit A-89, Press Courier, April 9, 1959.

"BALDONADO GETS GAS CHAMBER; JURY DELIBERATES LESS THAN TWO HOURS".

The penalty trial of co-defendant Baldonado commenced on April 6, 1959, and was concluded on April 9, 1959. The daily newspapers again published actual photographs of courtroom proceedings.

It was reported: "The jury was polled and Judge Blackstock said 'The jury is unanimous as it has to be'. He complimented the jurors as thoughtful and conscientious and said 'they showed the proper amount of courage and I am proud of you.'."

Publicity continued as on April 14, petitioner appeared in court on a motion by the Attorney General of the State of California to quash a subpoena served upon Warden Fred Dixon of San Quentin Prison. On April 16, 1959, petitioner moved again for a change of venue on the grounds that a fair and impartial trial could not be held within the County of Ventura. The motion was supported by affidavit which incorporated by reference the many newspaper exhibits illustrating the publicity given the trials of and the results of the trials of co-defendants Duncan and Baldonado. Affidavit verified the continuing wide-spread and intense prejudice against petitioner and co-defendants. Although no counter-affidavits were submitted by the District Attorney, the motion for change of venue was summarily denied (Tr. 165-170).

Petitioner's penalty trial commenced on April 20, 1959. Even with the limited question of penalty at issue, 72 prospective jurors were examined on voir dire examination. Ten were excused when challenged for cause by petitioner because they had fixed opinions concerning what penalty should be inflicted upon petitioner. Twenty-four were excused for having conscientious objection against the death penalty. One was excused by stipulation because of physical incapacity. All of the jurors examined had either read newspaper articles about the case, viewed television broadcasts concerning the case, heard radio broadcasts concerning the case, discussed the case and heard the case discussed, knew that both co-defendants had received the death penalty, had read the published statements of the district attorney, had read the comments of the trial judge complimenting another jury when it returned a death verdict for co-defendant Baldonado after a deliberation of less than two hours. Petitioner exhausted all 20 peremptory challenges. The jury, as constituted, was composed of six regu-

lar jurors with opinions as to what penalty should be imposed upon petitioner (Tr. 193-349).

After arguments and instructions, the jury retired to deliberate on April 29, 1959. The jury was returned to the courtroom upon its request that the testimony of Dr. Harvey and petitioner be read back by the Reporter. After hearing the testimony of Dr. Harvey read back by the Court Reporter, Judge Blackstock ordered the bailiff to take the jury to dinner and to bring them back as soon as they were through. The jury was never returned to the courtroom to hear the testimony of petitioner read back and subsequently returned a death verdict (Tr. 360-361).

On May 7, 1959, petitioner moved for a new trial which was denied and a sentence of death was imposed (Tr. 175-189).

Summary of Argument

Under California Law, petitioner was entitled to a jury trial, the sole issue of which was to determine his penalty for the crime of first degree murder. Prior to the commencement of his trial, there was an accumulation of the following:

(a) Extensive pre-trial publication by news media of details of case investigation, photographs of participants, photographs of the body of the deceased and alleged confessions of defendant and co-defendant;

(b) Headlined pre-trial publication by news media of inflammatory statements of the District Attorney urging the death penalty for defendant and explaining why he will seek the death penalty for defendant;

(c) Pre-trial publication by news media of verbatim testimony received by the Grand Jury returning the indictment;

(d) Pre-trial publication by news media of photographs of courtroom scenes, of arraignment and other appearances of defendant, which courtroom photography was permitted by the trial judge;

(e) Pre-trial publication by news media of photographs and moving pictures of the courtroom during the trial of a co-defendant, including photographs of the trial judge on the bench, defendant and other witnesses testifying, jurors in the jury box, jurors being questioned by counsel and counsel arguments;

(f) The pre-trial publication of comments of the trial judge to a jury in a co-defendant's case commending said jury when it returned a death verdict after less than two hours of deliberation;

(g) The pre-trial publication of comments of the trial judge inferring that counsel for petitioner was attacking the integrity, decency and humanity of the people of the county by making a motion for change of venue;

(h) The denial by the trial judge of motions for change of venue in the face of open courtroom hostility and evidence of community hostility evidenced by affidavits from responsible citizens.

As a result of the above circumstances petitioner was deprived of his right to a fair trial, and hence the judgment deprives him of life without due process of law, as guaranteed by the XIVth Amendment to the Constitution of the United States; the judgment sentencing him to death ought to be reversed with instructions that the penalty issue be retried in a county in California less susceptible to the District Attorney's prejudicial statements.

ARGUMENT

I

In a Capital Case, Due Process Is Denied When a Trial Is Influenced by Prejudicial Action of the District Attorney and Other Law Enforcement Officers.

The right to a fair and impartial trial is protected by the due process clause of the Fourteenth Amendment as a fundamental right implicit in the concept of ordered liberty. *Chambers* v. *Florida*, 209 U.S. 227; *Moore* v. *Dempsey*, 261 U.S. 86; *Snyder* v. *Massachusetts*, 291 U.S. 97; *Palko* v. *Connecticut*, 302 U.S. 319.

A fair trial is denied when prejudicial influences from outside the courtroom affect the conduct and outcome of the trial. *Frank* v. *Mangum*, 237 U.S. 309; *Shepherd* v. *Florida*, 341 U.S. 50. Due process is denied when pre-trial news publications of prejudicial and inflammatory material have affected the conduct and outcome of the trial. *Stroble* v. *California*, 343 U.S. 181.

The actions of a prosecutor in publishing prejudicial and inflammatory materials prior to trial has been condemned and held improper. *Stroble* v. *California*, *supra*, J. Frankfurter dissent; *Shepherd* v. *Florida*, *supra*, JJ. Jackson and Frankfurter concurring opinion; *In Re Savoy*, 360 U.S. 622, JJ. Frankfurter, Harlan, Clark and Whittaker concurring opinion; *Pennekamp* v. *Florida*, 328 U.S. 331, J. Frankfurter concurring opinion.

A conviction cannot stand when it is brought about by methods which "offend the sense of justice" or "shock the conscience". *Rochin* v. *California*, 342 U.S. 165; *Brown* v. *Mississippi*, 297 U.S. 278. Due process is denied when a trial is fatally infected with an absence of that fairness

essential to the very concept of justice. *Lisenba* v. *California*, 314 U.S. 219.

Capital offense cases justify greater scrutiny of due process as stated in *Reid* v. *Covert*, 354 U.S. 1, J. Harlan concurring opinion on p. 77:

> "So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases, the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial when the judge and trier of facts are not responsive to the commands of the convening authority. I do not concede that whatever process is due an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . compare *Powell* v. *Alabama*, 287 U.S. 45, with *Betts* v. *Brady*, 316 U.S. 455; nor is it negligible, being literally that between life and death."

II

Pre-Trial News Publications of Prejudicial Material Engendered a Community Atmosphere Wherein Petitioner Could Not Be Afforded a Fair and Impartial Trial.

A. *Under California law, a penalty trial is governed by the same rules of procedure as a trial on the issue of guilt.*

Section 190.1 of the California Penal Code was enacted (1) to eliminate the so-called "silent verdict" rule which had theretofore provided for imposition of the death penalty in the absence of a recommendation for life imprisonment; (2) to vest the trier of facts with absolute discretion to fix the penalty at either life imprisonment or death; and (3) to provide for an adversary trial proceeding wherein

competent, material and relevant evidence could be presented to the trier of facts concerning the penalty to be imposed. *People* v. *Friend*, 27 C. 2d 749, 306 P. 2d 463; *People* v. *Green*, 47 C. 2d 209, 302 P. 2d 307; *People* v. *Jones*, 52 C. 2d 636, 343 P. 2d 577.

Section 190.1 provides for a trial in the full technical sense and is governed by the same rules of procedure as any trial on the issue of guilt. *People* v. *Purvis*, 52 C. 2d 871, 346 P. 2d 22; *People* v. *Jones, supra.*

B. *The principal source of the pre-trial publications was the district attorney and other law enforcement officers.*

The Courts have recognized some distinction among the following cases: (1) The pre-trial publication of material obtained by news media through its own individual investigation or when the material has been obtained as "public property" in an official public proceeding; (2) The pre-trial publication of material released to news media by governmental officials or by the prosecutor. *Delaney* v. *U. S.* (C.A. 1st), 199 F. 2d 107, *Shepherd* v. *Florida, supra; Stroble* v. *California, supra;* Anno. 39 ALR 2d 1300. An obvious distinction is made in cases of a trial conducted by a judge sitting without a jury. *Bridges* v. *California*, 314 U.S. 252.

In federal courts, the proper amount of care is exercised to protect the right to an impartial trial under the Sixth Amendment. The publication of prejudicial material during trial is frequently grounds for new trial or mistrial, even though neither the prosecution nor any other governmental agency were responsible for the publications. *Marshall* v. *U. S.*, 360 U.S. 310. *U. S.* v. *Montgomery*, 42 F. 2d 254. *Coppedge* v. *U. S.*, 272 F. 2d 504; *U. S.* v. *Ogden*, 105 F. 371; Annotation 3 L. Ed. 2d 2004. The pre-trial publication of prejudicial material is grounds for change of venue or continuance, particularly when the source of the preju-

dicial material is the U. S. Attorney or some other governmental agency. *Delaney* v. *U. S., supra; U. S.* v. *Florio*, 13 F. R. D. 296.

California courts have found error to deny a change of venue when the prejudicial material published before trial emanated from a Superior Court Judge. *People* v. *McKay*, 37 C. 2d 792, 236 P. 2d 145. Other California cases have discussed the pre-trial publication of prejudicial material which did not have as its source the prosecutor or any other state official. *People* v. *Gomez*, 41 C. 2d 150, 258 P. 2d 825; *People* v. *McCracken*, 39 C. 2d 336, 246 P. 2d 913. *People* v. *Suesser*, 132 Cal. 631, 64 P. 1095. *People* v. *Yoakum*, 53 Cal. 566.

Cases involving the pre-trial publication of prejudicial material which has been released by the district attorney and associated in public officers are different and should be treated differently. *Delaney* v. *U. S., supra; In Re Savoy, supra. Stroble* v. *California, supra. Shepherd* v. *Florida, supra.*

First of all, it has been stated by this court and the California Court on many occasions that the district attorney is a representative of a sovereign state with a duty to refrain from improper methods calculated to produce a wrongful conviction. *Berger* v. *U. S.*, 295 U.S. 78. As the California court has stated in *People* v. *Hail*, 25 Cal. App. 342 at P. 361, 143 P. 803:

> "The district attorney represents the majesty of the law which stands for the protection of every citizen against the taking of his life, his liberty or his property without its due process—the law which condemns rather than commands the conviction of a person of a public offense upon insufficient evidence or by unfair means."

The deliberate and calculated publication of prejudicial material prior to trial by the district attorney is substan-

tially similar to other conduct which has been condemned and held to be in violation of due process. The prosecutor's knowing use of perjured testimony violates due process. *Napue* v. *Illinois*, 360 U.S. 264. The willful suppression by the prosecutor of evidence favorable to the defendant violates due process. *U. S. ex rel. Almeida* v. *Baldi* (C.A. 3d), 195 F. 2d 815. A conviction obtained by the use of a coerced confession violates due process. *Chambers* v. *Florida*, *supra*. Due process is violated when a conviction rests upon evidence obtained by brutality or methods which "shock the conscience". *Rochin* v. *California*, *supra*. Although not directly involving due process, an analogous situation is the exclusion of evidence obtained by unlawful search and seizure. *Weeks* v. *U. S.*, 232 U.S. 383. *People* v. *Cahan*, 44 C. 2d 434, 282 P. 2d 905.

Secondly, when the quoted source of the publications is a known public official, the recipient is likely to consider the published information authoritative. District Attorney Gustafson had been an elected official for over eight years and was widely known in the County of Ventura. His published statements would be more likely to impress the recipient than those of someone less known and not in a public office (Tr. 17). Further, the district attorney's published comments represented that he had personal knowledge of the facts of the case (Exhibits 13, 14, 3, 16, 17, 18, 9, 8, A-54). As district attorney he was in a position to receive information first and therefore able to cause the first publication with consequent greater impact (Exhibit 14).

The district attorney obviously had ready access to representatives of public news media (Exhibits 3, 16, 18, 8). The district attorney released prejudicial material for publication at a time and in a manner calculated to achieve the greatest impact (Exhibits 3, 8).

Further, the most effective remedy for dealing with the evergrowing problem of trial by newspaper concerns the

sources. In the note, *"Controlling Press and Radio Influence on Trials"*, 63 *Harv. L. Rev.* 840, the following control remedies are discussed; (1) Voluntary action by press and radio; (2) A cause of action by the injured person; (3) Change of venue; (4) new trial; (5) contempt action; (6) preventing disclosure to the press. The note comments upon the relative ineffectiveness of each remedy.

An interesting analogy is the California Supreme Court's consideration of various remedies to the unlawful search and seizure problem in *People* v. *Cahan, supra.* The California Supreme Court's conclusion as to the most effective remedy resulted in California's adopting the *Weeks* exclusionary rule of evidence as the remedy to the unlawful search and seizure problem.

In petitioner's case, District Attorney Gustafson was an experienced attorney and prosecutor. Despite repeated court rulings regarding his solemn obligation to deal fairly, despite repeated Court comments condemning the pre-trial publication of prejudicial material, and despite ethical restraints suggested by Canon 20 of the Canons of Professional Ethics of the American Bar Association, he willfully and deliberately engaged in trial by newspaper of a flagrant and contemptuous variety. As the California Supreme Court selected the exclusionary rule of evidence as the most effective control of the unlawful search and seizure problem, this court should select the most effective remedy to the pre-trial publicity problem by holding that conduct such as engaged in by the district attorney in petitioner's case is violative of due process.

C. *The character of the material published in petitioner's case was highly inflammatory and prejudicial.*

The character of the pre-trial publications is an important consideration. The pre-trial publication of a defendant's

alleged confession has been disapproved. *Stroble* v. *California, supra; Shepherd* v. *Florida, supra.* The publication of other offenses committed by the defendant has been condemned. *Delaney* v. *U. S., supra. U. S.* v. *Montgomery, supra.* Publications referring to the defendant by defamatory epithets is grounds for change of venue. *People* v. *Fernandez,* 89 N.Y.S. 2d 421. Publications of material inferring that the defendant was attempting to intimidate witnesses has been grounds for change of venue. *People* v. *Lucas,* 228 N.Y.S. 31.

Reference may be made to related cases dealing with the question of improper conduct by the district attorney in trial. It has been held to be improper argument for the district attorney to refer to the defendant by defamatory epithet. *People* v. *Talle,* 11 C.A. 2d 650, 245 P. 2d 633; *People* v. *Tufts,* 167 C. 266, 139 P. 78. It is error for the prosecutor in argument to infer personal belief that the defendant is guilty. *People* v. *Hidalgo,* 78 C.A. 2d 926, 179 P. 2d 102. It is error to cross-examine regarding prior convictions unless properly done for impeachment purposes. *People* v. *Braun,* 14 C. 2d 1, 92 P. 2d 402. It is error to appeal to patriotism and national emergency. *Viereck* v. *U. S.,* 318 U.S. 236. It is error to appeal to public interests. *Robinson* v. *U. S.* (CA 8), 32 F. 2d 505. It is error to urge conviction because of the prevalence of crime. *Turk* v. *U. S.* (CA 8), 20 F. 2d 129. Statements tending to arouse prejudice against a defendant because of non-residence is error. *Haywood* v. *Alabama Fuel & I. Co.,* 203 Ala. 550, 84 So. 259; *Peoria B & C Traction Co.* v. *Vance,* 234 Ill. 36, 84 N.E. 607; *Johnson* v. *Michigan Mutual Savings Association,* 242 Mich. 558, 219 N.W. 736. The situation of argument during trial is much less damaging because there is opportunity for the trial judge to order improper argument stricken and to admonish the jury to disregard it. Anno. 78 ALR 1438.

The pre-trial publications in petitioner's case contained material which would not have been admissible in court. Statements of the deceased are not admissible unless there is an issue of self defense or suicide. *Shepherd* v. *U. S.*, 290 U.S. 96. *People* v. *Talle, supra.* Evidence of grief of relatives of the deceased is not admissible in evidence and even such manifestations of grief during trial can constitute reversible error. Anno. 46 ALR 2d 950. Evidence of lie detector tests or the refusal to take a lie detector test by a defendant or witness may not be admitted. *People* v. *Aragon*, 154 C.A. 2d 646, 316 P.2d 370; *People* v. *Carter*, 48 C. 2d 737, 312 P. 2d 665. Unless supported by the evidence, it is improper to infer in argument that a witness was fearful of her safety by reason of testimony against defendant. *People* v. *Kirkes*, 39 C. 2d 719, 249 P. 2d 1. While the propriety of self-glorifying statements by the prosecutor in court have not been directly ruled upon, such comments would clearly be improper and not based upon evidence. *People v. Hidalgo, supra. People* v. *Talle, supra.*

D. *The pre-trial publications caused an atmosphere of community hostility wherein petitioner could not receive a fair trial.*

This court has ruled that the right to freedom of expression may not be abridged unless the publications by nature and under the circumstances constitute a clear and present danger. *Schenck* v. *U. S.*, 249 U.S. 47; *Gitlow* v. *New York*, 268 U.S. 652. The clear and present danger test has been applied to cases in which the publications contained defamatory material concerning defendants already convicted by jury and were directed to the trial judge concerning sentence to be imposed. *Bridges* v. *California, supra.* This court has also ruled that publications critical of rulings in a civil case are protected by the clear and present danger

test. *Craig* v. *Harney*, 331 U.S. 367. Of course, petitioner's case involves the right of freedom of expression only indirectly to the extent that such exercise of the right interfered with or denied petitioner due process. The constitutional freedom of the press does not include the right to discuss the question of guilt or innocence of the accused. *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912.

The reporting of the case was through dramatic language and methods. The publications were filled with suspense and mystery and speculation. Each occurrence reported was exploited in a spectacular way with the publication of headlines and photographs. The district attorney and associated law enforcement officers were portrayed as great heroes, and petitioner and co-defendants were depicted as despicable villains. The witnesses and the jurymen became prominent individuals. As examples:

> "LEAD SOUGHT IN BIZARRE PLOT. The case, which if written as fiction, would be rejected by any editor as too improbable . . ."
>
> Exhibit 5. "Higgins, a 40 year old ex-torpedoman in the Navy, now retired, became a local hero in the proceedings when he obtained a confession . . ."
>
> Exhibit *A-1*. "PRESS READY TO TURN OUT FOR DUNCAN MURDER TRIAL.' The Duncan Case will make the third time Gustafson has asked a Ventura County jury for the death penalty. The other two times, jurors gave him what he asked . . ."

Judge Blackstock furnished public news media with the opportunity for courtroom photography which became a vehicle for sensational reporting. Still photographs and movies were openly permitted by the trial judge of actual court proceedings, of witnesses testifying, of counsel argu-

ments, of counsel questioning prospective jurors on voir dire examination, and whatever else may have transpired in the courtroom whether the court was in session or not. Throughout the trial proceedings, all of the substantive evils were present which had originally prompted the adoption of Canon 35 of the American Bar Association Canons of Judicial Ethics. 46 ABAJ 840; 44 ABAJ 760; 42 ABAJ 341; 41 ABAJ 55; 40 ABAJ 838; 39 ABAJ 568; *Tribune Review Publishing Co.* v. *Thomas,* 153 F. Supp. 486, 104 *U. Pa. L. Rev.* 603. Of greater significance, however, was the fact that the published photographs and published moving pictures served to magnify and intensify the already existing hostility and prejudice of the community toward petitioner and co-defendants. The publication by the news media of such photographs and moving pictures increased the already over-dramatization of the case. Moreover, Judge Blackstock's announcement that photography would be permitted served as an invitation to greater press coverage of the case.

The community hostility and prejudice did not subside prior to trial. In *Stroble* v. *California, supra,* this court took into consideration the fact that unfavorable publicity subsided within a short period of time after arrest and initial court processing. The California courts have also considered this factor. *People* v. *Burwell,* 44 C. 2d 16, 279 P. 2d 744. In petitioner's case, from December 15, through December 26, 1958, public news media published detailed phases of the investigation along with the inflammatory statements of the district attorney urging the death penalty for petitioner and co-defendants; from December 26, 1958, to February 16, 1959, news media concerned itself with a publicity build-up for the trial with the publication of verbatim passages from the Grand Jury transcript, accounts of preliminary motions and appearances of petitioner and co-

defendants in court, the trial judge's comments about the change of venue and the district attorney's published statements about why petitioner and co-defendants should receive the death penalty. From February 16, through April 3, 1959, public news media bombarded the public with pictorial and verbal accounts of the trial of co-defendant Duncan. From April 6, 1959, through April 14, 1959, news media described the trial and death sentence and trial judge's compliments to the jury in the case of co-defendant Baldonado. News media kept public prejudice and hostility alive up to April 16, when petitioner made his second motion for change of venue prior to his trial commencing on April 20, 1959.

Some indication of the atmosphere of the community is reflected in the publications themselves as observed by Judge Kallodner in his dissenting opinion in *U. S.* v. *Handy*, (CA 3), 224 F. 2d 504.

> Exhibit 9, Star Free Press, December 29, 1958. (Editorial) "DOING THE DIRTY WORK FOR THOSE NEIGHBORS"
>
> Exhibit *27*, Press Courier, December, 1958 (Editorial). "THE DEATH PENALTY".

There were innumerable public outbursts of hostility and prejudice. These instances included the reported assault upon co-defendant Duncan (Exhibit 2), the reference to petitioner and co-defendant by vile epithets (Tr. 15), expressions of courtroom spectators of disapproval of the plea of not guilty by reason of insanity of co-defendant Duncan (Tr. 16). The courtroom spectators' expression of disapproval as counsel for petitioner suggested a later trial date (Tr. 16), the necessity of petitioner and co-defendants being brought to the courtroom and returned

through rear doors to prevent turmoil (Exhibit 1), reports of threatening letters received by co-defendant Duncan (Exhibit A-40), derogatory remarks by courtroom spectators to the son of co-defendant Duncan (Exhibit A-50), courtroom spectator applause when Judge Blackstock denied co-defendant's motion for new trial (Exhibit A-50), and reports of persons coming to the Courthouse at 3:30 A.M. in order to be first in line for courtroom seats (Exhibit A-51).

A significant factor in *Stroble* v. *California, supra, Palakiko* v. *Harper* (CA 9), 209 F. 2d 75, was that counsel for defendant failed to make any motion for change of venue. This factor was not considered determinative in *Delaney* v. *U. S., supra.* In petitioner's case, petitioner moved for change of venue at an early stage of the proceedings supported by affidavits evidencing the widespread hostilities and prejudice (Tr. 14-23). Again prior to trial, petitioner moved for change of venue supported by affidavit showing the continuing prejudice and hostility (Tr. 62-71).

This court commented in *Stroble* v. *California, supra,* that there was no showing that the jurors had read any of the pre-trial publications complained of. It was also commented upon in *Delaney* v. *U. S., supra,* that the defendant had not exhausted all his preemptory challenges. In the case at issue, petitioner did exhaust all his preemptory challenges. Further, each of the jurors stated on voir dire examination that he or she had read some of the pre-trial publications concerning the case. In fact, five of the twelve regular jurors had formed an opinion as to what penalty should be imposed upon petitioner, based on reports of public news media (Tr. 191-349). Jurors, of course, are "extremely likely to be impregnated by the environing atmosphere". *Frank* v. *Mangum, supra.* The limitations of

voir dire examination have been recognized in *Coppedge* v. *U. S.*, *supra*, wherein the court stated, "it is too much to expect of human nature that a juror would volunteer in open court, before his fellow jurors, that he would be influenced in his verdict by newspaper story of the trial". The inherent limitations of voir dire examinations are similar to court instructions and the statement in *Krulewitch* v. *U. S.*, 336 U.S. 440, at P. 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction". The statement of a juror that reading a prejudicial newspaper article has not influenced him should not be considered conclusive. In *Delaney* v. *U. S.*, *supra*, Justice Magruder, in commenting upon the average juror's inability to overcome the prejudicial effects of intense publicity, said: "One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconception as to probable guilt, engendered by pervasive pre-trial publicity." See also 63 Harv. Law Rev. 840; 34 N. Y. Univ. Law Rev. 1278; *Murphy and Newcomb, Experimental Social Psychology* (1937), pp. 961 through 969; *Cantrill and Allport, Psychology of Radio*, pp. 177-180; *Doob, Public Opinion and Propaganda* (1948), 337; 14 U. Pitt. Law Rev. 614.

Section 1076 of the California Penal Code was not intended to apply in a change of venue question. As stated by the California Supreme Court in *People* v. *Suesser*, 132 Cal. 631: "A fair trial cannot be had where an unbiased jury cannot be had, and a juror who has an unqualified opinion that defendant is guilty, founded upon a knowledge of material facts of the case, does not possess a common law qualification for a juror and it does not matter how

that knowledge was obtained, provided the juror believes it." In the *Suesser* case, it was contended that the opinions formed by jurors were based upon rumor or newspaper reports and therefore the juror was not disqualified and a change of venue was not warranted. In *People* v. *Plummer*, 9 Cal. 298, the California Supreme Court stated: "It is intended that jurors, before acting as such, shall know nothing of the matter in difference, or of the parties; that their mind shall not be preoccupied, but they shall be prepared to receive and to weigh such truths as may be submitted to them . . . The very meaning of the word trial, which is an examination by a test, shows that the triers are to act not upon previously formed opinions, but upon inquiry, first instituted and carried on before them."

III

The Trial Judge Did Not Act Reasonably in Denying Motions of Change of Venue and in Other Pertinent Matters.

A. *The trial judge appeared to misinterpret the effect of a change of venue and his published comments implied to the public that a motion for change of venue was an attack upon the integrity, decency and humanity of the people of Ventura County.*

Judge Blackstock, age 83, presided throughout the proceedings and trials in petitioner's case and in the cases of co-defendants Du[illegible] and Baldonado. A factor considered important in *Stroble* v. *California, supra,* and in *Delaney* v. *U. S., supra,* was that the trial judge exercised great care to insure that prejudicial influences from outside the courtroom did not cause any interference with the trial. This positive factor was not present in petitioner's case. Not only did the trial judge do little or nothing to

prevent the pre-trial publicity and community hostility from interfering with the trial, he actually contributed to the already existing community hostility by comments which were published prior to petitioner's trial and by permitting the widest possible press coverage of the proceedings and cases prior to petitioner's trial.

It does not appear that Judge Blackstock fully understood the meaning and effect of a change of venue. In *People* v. *Fernandez, supra,* at 437, it was stated:

> "A decision of this kind (change of venue) is sometimes misunderstood by the public. Therefore, it should be noted that where a change of venue is allowed, no reflection is cast upon the fair-mindedness of the jurors of the County from which the case is removed."

In *U. S.* v. *Parr,* 17 F. 512, in making reference to affidavits for change of venue, on page 517, it was stated:

> "Some of them apparently were so uninformed about the law and court procedure that they erroneously regarded the motion by defendant for a change of venue as a reflection on the people of Corpus Christi."

In denying petitioner's first motion for change of venue on January 15, 1959, Judge Blackstock commented in reference thereto:

> "It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County" (Tr. 137).

This comment not only illustrated misunderstanding by the trial judge about the effect of a change of venue, but

this comment also was published in public news media (Exhibit A-2) and served to imply to the public that petitioner and counsel were attacking the integrity, decency and humanity of the people of Ventura County by moving for a change of venue.

B. *The trial judge appeared to believe that jurors' opinions based upon public news media reports were immaterial.*

During the hearing of petitioner's second motion for change of venue on April 16, 1959, petitioner submitted affidavit verifying the community hostility and incorporating by reference in the affidavit some 89 newspaper exhibits. No counter affidavits were submitted by the prosecution. In discussion on the motion, Judge Blackstock stated the opinion that the newspaper publications were not material to a motion for change of venue because of Section 1076 of the Penal Code.

"The Court: Well, opinions formed from newspaper articles are immaterial, anyway.

Mr. Henson: They might be immaterial legally, your Honor, but, actually, they certainly are material and I think your Honor will agree with that, won't you?

The Court: That the newspaper articles are material?

Mr. Henson: I am saying that they are actually material as to a person's state of mind. I read a newspaper. I read the same newspaper three months and I hear of nothing on the front page except the Elizabeth Duncan case, Baldonado case and the Moya case. How can I help but forming some opinion?

Furthermore, Judge Blackstock foreclosed any objective inquiry into the change of venue question by his statement in ruling on petitioner's second motion of change of venue by his statement that he had "absolute confidence" in the people of Ventura County (Tr. 170).

C. *The trial judge's published compliment to juries in co-defendants' cases which returned death verdicts were prejudicial to petitioner.*

Petitioner's trial followed the trial of co-defendant Duncan and co-defendant Baldonado. With knowledge of this fact, Judge Blackstock proceeded to compliment the juries which returned death penalty verdicts in each of the co-defendants' cases, and which compliments were published.

> Exhibit A-36, March 21, 1959, Star Free Press. "MRS. DUNCAN TO DIE". "A few moments later, Judge Blackstock discharged the jury. He commended jury members for being an exceedingly careful and conscientious jury and said 'the people of the State of California are very grateful for your services.'"
>
> Exhibit A-86, Press Courier, April 9, 1959. "BALDONADO GETS GAS CHAMBER; JURY DELIBERATES LESS THAN TWO HOURS." "The jury was polled and Judge Blackstock said 'the jury is unanimous as it has to be'. He complimented the jurors as thoughtful and conscientious and said 'they showed the proper amount of courage and I am proud of you'".

These comments which were published prior to petitioner's trial were extremely damaging for the reason that the effect was to place the judicial seal of approval upon

prejudicial and inflammatory statements previously published by the District Attorney and other law enforcement officers and coincided with the following:

> Exhibit A-86, March 21, 1959, Star Free Press: "District Attorney Roy A. Gustafson hailed the verdict and said it should have an effect on heading off moves to abolish the death penalty in California."

The propriety of a Trial Judge in making himself present at the trial of a co-defendant has been considered by this Court in *U. S.* v. *Handy,* 351 U.S.. 454. The propriety of a comment in a co-defendant's case was also considered therein. It is worthy of note that the published comments of the trial judge in *U. S.* v. *Handy, supra,* were not read by any members of the jury. In *North Carolina* v. *Baldwin,* 178 NC 687, 100 SE 348, the remarks of a trial judge in a co-defendant's case were held not to be error when it was not shown that any jurors in the subsequent case of a co-defendant heard the remark.

However, in petitioner's case, it was shown that Judge Blackstock's published comments to co-defendant Baldonado's jury were read by a prospective juror and such voire dire examination necessarily brought this matter to the other prospective jurors.

> Q. (Juror Germann) And did you read that the co-defendants, the defendants, Elizabeth Duncan and Augustine Baldonado, both received the death penalty?
>
> A. Yes, I did.
>
> Q. And did you read in the Oxnard Press Courier that Judge Blackstock complimented the jury in the Augustine Baldonado case for their verdict?
>
> A. Yes, I did.

Q. You no doubt know of Judge Blackstock, do you not?

A. Yes (Tr. pp. 217-218).

The problem involved is somewhat analogous to the situation where the trial judge comments in open court expressing his belief concerning an ultimate fact of the case. *U. S.* v. *Murdock*, 290 U.S. 389; *People* v. *Mahoney*, 201 Cal. 618, 258 P. 607; *People* v. *Earl*, 10 CA 2d 163, 51 P. 2d 147; *People* v. *Johnson*, 11 CA 2d 22, 52 P. 2d 964.

D. *The trial judge did not act reasonably in other pertinent matters affecting the trial.*

This was not a case wherein the trial judge permitted a broad scope of voir dire examination. An example of the voir dire is the following:

"Q. Mrs. Weidemann, let me ask you this: As a result of reading in the newspapers about the Olga Duncan murder case and the trials of Elizabeth Duncan and Augustine Baldonado, did you form any opinion as to what penalty should be imposed upon this defendant Luis Moya?

A. Yes.

Q. Do you have that opinion now?

A. At this moment, yes.

Q. Would it take evidence to remove that opinion from your mind?

A. Yes.

Q. Even though Judge Blackstock instructs you that you must disregard your personal opinions in this case, could you do that? That is, do you think you could possibly wipe this opinion out of your mind and judge this case just on the evidence here?

Mr. Gustafson: I'm objecting to that, your Honor, as something that assumes a qualification that the law doesn't. The law doesn't require that any juror wipe an opinion out of his mind. It simply is that the juror, notwithstanding the opinion, can fairly and impartially try the case.

The Court: That's right.

Mr. Henson: All right. I'll reframe the question.

Q. Even though you do have this opinion as to what penalty should be imposed upon this boy, you think that notwithstanding that opinion, you could judge this case fairly and impartially?

(fol. 79) A. I feel that I could.

Q. Would it be difficult for you to do so?

A. I don't think so.

Q. I appreciate your being so honest.

The Court: She has already said she would predicate any opinion that she might arrive at entirely and absolutely upon the evidence that she hears in this case, and I don't see any point in repeating the same questions that are propounded by the court.

Mr. Henson: Well, it's only this, your Honor, I don't mean to prolong this, but sometimes people don't quite understand, and I'm just trying to bring it out a little bit more here in a different way.

The Court: Well, you can't assume that an intelligent looking person doesn't understand a plain unequivocal question. You understand absolutely that any verdict you arrive at must be predicated or based on the evidence in this particular case right here that we're trying now. You understand that, don't you?

Prospective Juror: I do, your Honor.

Mr. Henson: Well, your Honor, even though she understands it, I'm asking if she could do that?

The Court: Well, she already told me that she can do it and that she will do it; isn't that right?" (Tr. 225 & 226).

The denials for change of venue were made by Judge Blackstock with full knowledge of all the matters contained in Section II of this brief. While a question of change of venue is a matter resting within the discretion of a trial judge, the California Supreme Court has noted in *People* v. *Lee*, 5 Cal. 353, "It is not to be supposed that we will trust implicitly the discretion of inferior courts."

The discretion exercised by Judge Blackstock may be judged from a reading of the entire record of petitioner's case and the records of the cases of co-defendants Elizabeth Duncan and Augustine Baldonado. Other matters cited as error were previously submitted to this Court by way of petition for writ of certiorari.

It cannot be contended that the measurement of due process is in any way affected by the nature of the offense. As this Court stated in *Chessman* v. *Teets*, 354 U.S. 156 at p. 165:

"On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in

this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

Conclusion

Petitioner was deprived of a fair trial within the meaning of the due process laws of the Fourteenth Amendment by reason of an accumulation of circumstances which included extensive pre-trial publications primarily engendered by the prosecutor and other law enforcement officers which publications contained highly prejudicial and inflammatory material. The result of the publications was an atmosphere of community hostility and prejudice. The trial judge did not exercise sound discretion in denying petitioner's two motions for change of venue and by contributing to the community hostility and prejudice by his published comments implying that counsel for petitioner was attacking the humanity, decency and integrity of the people of Ventura County by a motion for change of venue, by permitting widespread publicity of a trial of a co-defendant occurring prior to petitioner's trial, and further by the trial judge's published remarks approving and commending and complimenting the verdict of juries in the cases of co-defendants Duncan and Baldonado which preceded petitioner's trial.

It is respectfully submitted that the judgment below be reversed and the cause remanded for retrial on the issue

of penalty in a county in California other than Ventura County.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1960.
No. 186

LUIS ESTRADA MOYA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

Introduction.

Unlike co-petitioner Baldonado's brief, petitioner Moya's brief distorts the facts, goes beyond the record and is completely misleading.

The first three paragraphs under "Statement of Facts" leave the impression that defendants Moya, Baldonado and Duncan were arrested for murder about the middle of December, interrogated daily without benefit of counsel and not arraigned until December 30. No part of the record is cited in support of these allegations and none could be. The fact is that not one of the defendants was arrested for the murder of Olga Duncan until after they were all indicted for the crime

on December 26, 1958. It is true that they were all in custody when indicted, but on other charges. Elizabeth Duncan was under arrest for obtaining a fraudulent annulment of her daughter-in-law's marriage, a charge to which she subsequently pleaded guilty. Baldonado was under arrest for failing to provide for his children, a charge to which he had already pleaded guilty. Moya was under arrest as a parole violator and was awaiting return to the state prison (a procedure which does not involve arraignment or the benefit of counsel). Respondent has gone outside the record to state these facts in order that petitioner's outside-the-record, misleading statements will not be accepted by this Court as the truth.

In the next paragraph petitioner states that the population of Ventura County was 170,000 wheras the 1960 Federal Census shows 199, 138 which necessarily means that the population was nearly that figure one year earlier. Petitioner states there were two daily newspapers published in the county whereas there were three (the other being the Santa Paula Chronicle).

Out of the mass of newspapers now before this Court, petitioner quotes selected articles and even then omits those portions of the articles indicating the fair treatment of the subject given by the press. Respondent urges that this Court read *all* the articles in their *entirety* to get a proper perspective. Moreover, this Court should bear in mind that petitioner's counsel (at the trial and in this Court), Burt Henson, submitted

as exhibits not *all* of the newspapers carrying accounts of the case, but only selected issues. For example, while counsel now complains about courtroom photography, he did not object when pictures of him arguing a motion for change of venue were taken and published. [Exh. A-1 to Declar.; Tr. of R. p. 63.]

Petitioner points out that Exhibit A-7 contained a photograph and story about the prosecuting attorney. He neglects to point out that this was a two part feature prior to the trial of Mrs. Duncan and that the same newspaper on February 2, 1959, published a similar photograph and story about the defense attorney, S. Ward Sullivan. [Exh. A-6 to Declar.; Tr. of R. p. 65.]

Perhaps the most glaring example of the conduct of Burt Henson is the matter of petitioner's confession. A tape recording of petitioner's confession was made by the officer to whom the confession was made. The contents were not released to the public by any law enforcement personnel. But Mr. Henson, using discovery procedures available in California, obtained the tape. [Tr. of R. pp. 41-43.] Thereupon he had a copy made and turned it over to a radio station for repeated broadcasting throughout Ventura County. Newspapers described this incident. The confession—in petitioner's own voice—was a cold blooded description of how he brutally murdered Olga Duncan. Nothing reported in the newspapers could compare in effect with this inci-

dent engineered by petitioner's counsel. Petitioner himself also gave radio interviews regarding his part in the case. No menti n, of course, has been made in petitioner's brief about these facts.

Petitioner throughout his brief assumes that what the newspapers reported is what in fact occurred. Thus he cites the "assault upon co-defendant Duncan" and the "threatening letters received by co-defendant Duncan" as evidence of "public outbursts of hostility and prejudice". Although one newspaper reported an assault on Elizabeth Duncan, the report was wholly false. [Tr. of R. p. 26.] There is not one word in the record to support any claim that Mrs, Duncan received any threatening letters. Many of the other newspaper reports are not supported by the record. One report, for example, said that 1,000 persons were in the courtroom when defendants were arraigned. [Exh. 2.] The fact is that there are 99 seats in the courtroom [Tr. of R. pp. 128, 129] and there were less than 200 persons inside and outside the courtroom, standing and sitting. [Tr. of R. pp. 26, 128, 129.]

Respondent asks that the case be heard in this Court as it was in the trial court and in the Supreme Court of California—on the evidence and on the record, not on newspaper stories.

ARGUMENT.

I.

Was Petitioner's Right to the Trial Guaranteed by the Due Process Clause of the XIV Amendment Violated in View of the Conduct of the District Attorney, the Resulting Publicity, and the Other Circumstances Under Which the Trial Was Held?

Respondent understands that the sole point posed by the Court's question is whether by holding petitioner's trial before a jury in Ventura County on April 20, 1959, California deprived petitioner of a fair trial. Petitioner claims that it was impossible for him to be fairly tried before a jury at that time and place because of the newspaper publicity regarding the case.

Petitioner murdered Olga Duncan on November 17, 1958. He was brought to trial over five months later for the sole purpose of having his penalty fixed, he having theretofore pleaded guilty to first degree murder. The sole question before the jury was whether petitioner should be imprisoned for life or executed. The jury determined that he should be executed.

Petitioner, in his appeal to the California Supreme Court, alleged that numerous errors occurred during the judicial proceedings against him. That court found that except for one evidence ruling which was nonprejudicial, no errors occurred. It unanimously affirmed the judgment. (*People v. Moya*, 53 Cal. 2d 819, 350 P. 2d 112 [1960].) Respondent understands that this Court's order on granting certiorari eliminated any

question of the propriety of the trial judge's rulings during the course of the judicial proceedings. Thus the issue is confined to whether facts and circumstances outside of the judicial proceedings and prior to the trial deprived petitioner of a fair trial. There is no showing that any fact or circumstances occurred outside the judicial proceeding except the publication of the newspaper articles which were submitted as exhibits to applications for change of venue. Consequently, the narrow issue is whether the pre-trial publications prevented the selection of a fair and impartial jury.

A. The Sole Question Concerning Newspaper Articles Is Their Effect on Persons Exposed to Them, Not Whether They Accurately Reported the Facts.

Suppose a certain newspaper published a story that the judges of the county held a meeting and unanimously declared that they hoped and expected that every person called as a juror for petitioner's case would vote for the death penalty. No such meeting was held and no such statement made by any judge. Nevertheless, if the effect of reading the article was such that the reader thereafter could not fairly try petitioner, the fact that the story was wholly false would not make trial by such a person (as a juror) any less unfair.

In this connection it should be noted that the out-of-court conduct of the District Attorney is not properly in question here, nor was it in the courts below. Newspapers were attached as exhibits to petitioner's applications for change of venue in the trial court. The question before the judge was whether (assuming all prospective jurors would have read the articles) the effect of the articles on every reader would be that he

would be unable to fairly try petitioner on the issue of penalty. Where an article purported to relate a statement by the District Attorney, the judge was not concerned with whether the District Attorney actually made such a statement or with whether it was true, but with whether the effect on prospective jurors was such that they would necessarily become and remain legally biased.[1] Counsel for petitioner acknowledged this when he said in the trial court: "And it doesn't make any difference whether the publications . . . were true or not." [Tr. of R. p. 132.]

The District Attorney did not file an affidavit denying the making of those statements (among those attributed to him in the 131 newspaper exhibits) which were in fact not made by him. The reason is simple. Whether he made any or all of the statements attributed to him was not in issue. Suppose, for example, that a prospective juror read an article in the Ventura Star-Free Press of January 19, 1959, a copy of which was filed as an exhibit three months later on April 16, 1959. What possible materiality would an affidavit by the District Attorney filed in court in April have on the juror's state of mind? Would the trial judge be entitled to believe that any report prejudicial to petitioner

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[1]The words "biased" and "prejudiced" as used throughout this brief refer to a state of mind wherein a person's opinions are so fixed that he is unable to decide an issue on the basis of evidence presented to him unaffected by the previously formed opinions. In California, as in almost all jurisdictions, a person is not "biased" or "prejudiced" simply because he has heard or read about a case or because he has formed opinions about the issues if, notwithstanding his opinions, he can decide the case solely on the evidence presented in court. To distinguish between one who has an opinion which does not disqualify him as a juror and one whose opinion is "fixed" and thus disqualifying, the latter is often referred to herein as "legally biased."

was rendered inoffensive because the District Attorney said in court three months later (and not in the presence of the juror) that he made no such statement?

Moreover, the out-of-court conduct of the District Attorney can not be proved by newspaper articles attached as exhibits to an affidavit supporting a motion for change of venue. The fact that a newspaper says that the District Attorney made a certain statement is not proof that the statement was made. It is the rankest kind of hearsay. The California Supreme Court recognized this fact and carefully used such phrases as "an article quoted the district attorney as saying", as "an article quoted the district attorney at length", and as "the district attorney was reported to have made" certain statements. The court did not say, and it could not say, that the District Attorney did in fact make those statements because there was no proof that he did (except insofar as he admitted making one statement in his own affidavit). To emphasize the point that there was no proof of the out-of-court conduct of the District Attorney, the California Supreme Court noted that at oral argument "the district attorney denied making most of the statements attributed to him." The California Supreme Court, in other words, recognized, as did the trial court and counsel, that the purpose of the exhibits was to determine whether prospective jurors who might have read them would have become biased and not to determine whether what the articles said was true.

Respondent has treated this point at length because petitioner sought certiorari on the claim that the articles were proof of the facts stated therein and because this Court, in its order of June 27, 1960, seemed to

accept this view when it asked whether "the conduct of the District Attorney" violated petitioner's right to a fair trial.

B. The Newspaper Publications Were Not Such as to Cause Every Person Who Read Them to Become Legally Biased.

Since there is nothing in the record to indicate that any particular juror actually did not act fairly and impartially, any conclusion that a juror did not so act must necessarily be based on the premise that because of the newspaper publications the juror *could not* (and therefore the juror *did not*) act fairly and impartially.

For convenience in discussing this point, respondent has divided the publications into three categories which will be separately discussed.

1. *The Reported Facts of the Crime and of the Trials of Petitioner's Co-defendants.*

Olga Duncan, a pretty, young Santa Barbara nurse who was the wife of a Santa Barbara attorney, disappeared on November 17, 1958. She was pregnant and there soon began to be news stories about her disappearance. By the middle of December, interest in the case had spread beyond Santa Barbara County. Los Angeles newspapers carried stories about the matter and newspapers in Ventura County likewise did. At this time there was no indication that anything had happened in Ventura County.

Then on December 22, 1958, the newspapers reported that Augustine Baldonado, awaiting sentence in Ventura County on another charge, confessed that he, together with petitioner, murdered Olga Duncan on No-

vember 17, 1958, and buried her in Ventura County. [Exhs. 3, 10, 24, 30 to affidavit; Tr. of R. pp. 17; 19, 21.] On December 26, 1958, the newspapers reported that petitioner confessed the murder. [Exhs. 18, 26, 34 to affidavit; Tr. of R. pp. 20, 21, 22.]

After the transcript of the grand jury hearing was filed, it became a public record (*People v. Darby*, 114 Cal. App. 2d 412, 250 P. 2d 743 [1952]), and the newspapers quoted at length from the testimony including that given by petitioner as a witness.

The trial of co-defendant Elizabeth Duncan (who had hired petitioner to commit the murder) began on February 16, 1959. It was widely reported and pictures of courtroom scenes were included. Although the District Attorney had asked that the court make an order against taking pictures in the courtroom, no such order was made when defendant Duncan and her counsel expressly agreed that pictures could be taken. [Tr. of R. (Duncan case) pp. 259, 260.] The testimony of petitioner, who was a witness, was reported in the newspapers. He was quoted as admitting the murder of Olga Duncan.

Local newspapers also reported the trial of co-defendant Baldonado which began April 6, 1959, although petitioner was not a witness in that case.

When petitioner's trial began on April 20, 1959 penalty was the sole issue to be determined, petitioner having theretofore pleaded guilty to first degree murder. The first question before this Court is whether each and every person reading the articles now before this Court would necessarily be of such frame of mind that he could not fairly and impartially determine

whether petitioner should suffer the death penalty or life imprisonment.

Respondent believes that the answer to the question can be supplied only by the subjective reactions of the members of this Court after reading all of the exhibits.

If a member of this Court can read the articles without concluding that if he were to try the case, he would impose the death penalty on petitioner regardless of what the evidence might be, then petitioner's right to a fair trial was not infringed.[2] This is so for the reason that nothing in the record indicates that any of the twelve jurors had any fixed opinion from any source as to what the penalty should be and nothing indicates that any juror was less capable of deciding the case on the evidence than a member of this Court would be. On the contrary, the jurors all declared that they would decide the case solely on the evidence and petitioner accepted these declarations because he did not challenge a single juror.

Respondent submits that a reading of the exhibits would not leave every reader in the frame of mind that petitioner should be executed regardless of whatever evidence might be presented in court.

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[2]The converse is not true. If a member of this Court upon reading the newspapers feels that he would thereafter be unable to fairly try the case, it does not mean that all persons would have similar reactions. Before concluding that petitioner was deprived of a fair trial, it would be necessary to find that (1) all persons would necessarily be affected in the same manner as the Justice, (2) at least one juror read the matter deemed offensive, (3) the reaction continued to exist from the time of reading to the time of trial, (4) the juror in stating that he could try the case fairly was incorrect in his conclusion and (5) petitioner may raise the point in this Court even though at the trial he did not challenge any juror on the ground of bias.

2. The Reported Comments of the Trial Judge.

The trial judge, in denying petitioner's motion for a change of venue on January 15, 1959, said, among other things, that "[i]t is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this County." [Tr. of R. p. 137.] Petitioner's counsel immediately construed the remark as indicating that the judge thought counsel was critical of the local citizenry. The judge, however, quickly disclaimed any such intent. [Tr. of R. p. 138.]

Petitioner included as an exhibit [Exh. A-2, erroneously cited as Exh. A-1 to declaration; Tr. of R. p. 63] the January 15, 1959, issue of the Ventura County Star-Free Press containing the above quoted remarks of the trial judge. He now vigorously contends that the published remarks erroneously indicated that the motion was an attack on the citizens of the county and that the citizens thereby became hostile toward him. As is the case in so many other instances of petitioner's reliance on newspaper clippings, petitioner has not told the whole story. At the request of counsel for petitioner, the judge issued the following statement to the press:

> "I want to correct any false impression which might have been created by reason of a statement made by me in an order denying a motion for a change of venue, in the case of The People of the State of California vs. Elizabeth Ann Duncan, Luis Estrada Moya and Augustine Baldonado. The statement I am referring to reads as follows:

"'It is a sad commentary on the integrity, decency and humanity of the people of Ventura County to say that defendants, whose very lives may be at stake, cannot receive a fair and impartial trial in this county.'

"By making this statement, I intended in no way whatever to suggest that Burt Henson, counsel for defendant Luis Moya, and John Danch, counsel for defendant Augustine Baldonado, were attacking the integrity, decency or humanity of the people of Ventura County. Neither counsel at any time or in any manner said or did anything to reflect upon the integrity, decency or humanity of the people of Ventura County. I believe the motions for change of venue were made by counsel acting in the utmost of good faith. It is both the legal right and duty of counsel to move for a change of venue whenever he feels such a motion is necessary in view of the circumstances surrounding that particular case. The statement set forth above is merely my way of stating that I believe the defendants shall receive a fair and impartial trial in Ventura County."

That statement was printed in the January 17, 1959, issue of the Ventura County Star-Free Press and in the January 19, 1959, issue of the Oxnard Press Courier. Significantly, however, petitioner chose not to include as exhibits either of these issues.

Notwithstanding petitioner's failure to disclose the whole picture, respondent submits that no person reading the published report of the judge's comment on January 15, 1959 (and not the later explanation),

would react in such a way that he could not, more than three months later, fairly decide whether petitioner's penalty should be life imprisonment or death.

At the conclusion of co-defendant Baldonado's trial, the trial judge said:

> "All right, ladies and gentlemen of the jury, I have been observing you throughout the week and I have concluded that you are a very, very thoughtful, conscientious jury. You had a very hard task to perform and you showed the proper amount of courage and I congratulate you. The people of Ventura County and of the State of California are very thankful for your services. Your checks for mileage and per diem will be mailed to you. You are now discharged." [Rep. Tr. (Baldonado case) p. 467, lines 10-17.]

The Oxnard Press Courier of April 9, 1959, reported these comments as follows [Exh. A-89 to declaration; Tr. of R. p. 69]:

> "The jury was polled and Judge Blackstock said, 'The jury is unanimous as it has to be.' He complimented the jurors as thoughtful and conscientious and said they 'showed the proper amount of courage and I'm proud of you.' "

The contention that this publication dictated a death penalty for petitioner has already been answered by this Court. In *United States v. Handy,* 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965 (1956), a death verdict on co-defendants Foster and Zeitz was returned on June 4, three days before the trial of petitioner for the same offense. The trial judge was quoted in the

newspapers as telling the Foster-Zeitz jurors (pp. 907-968):

> "'I don't see how you could, under the evidence, have reached any other verdict. Your verdict may have a very wholesome effect on other young men in all vicinities who may come to realize the seriousness of the folly in which so many young men indulge in these days. The only hope of stemming the tide of such crime by youth is to enforce the law which you have indicated by your decision.'"

Petitioner's trial resulted in the imposition of the death penalty. This Court said (p. 971):

> "Nor do we conclude that petitioner was prevented from obtaining a fair jury trial by reason of Judge Boyer's commendatory remarks to the Foster-Zeitz trial jury, reported in the local press two days before petitioner's trial. At most, petitioner has shown that this created a possible opportunity for prejudice."

3. *The Reported Remarks of the District Attorney.*

The District Attorney is quoted in the Ventura County Star-Free Press of December 22, 1958, and the Oxnard Press Courier of December 24, 1958, as being in favor of the retention of the death penalty in California. Petitioner claims that the article was a demand by the District Attorney that petitioner be executed and that the story necessarily would influence every reader against petitioner.

In the first place, the statement on its face shows that it was concerned with contemplated legislation, not with the trial of petitioner's case. That the reporter

of the Ventura County Star-Free Press considered it as such is illustrated by the opening sentence of the story: "District Attorney Roy Gustafson saw the Duncan murder as reason for a continuation of California's death penalty." The headline writer saw it in the same light because the headline reads: "D. A. Urges Death Term in Killings." There was only *one* killing involved in the instant case. The plural word "Killings" clearly indicates that the statement related to the retention of capital punishment for murders in general and not for this particular murder alone. There was nothing unusual in the District Attorney's public statement on this subject because he had often been quoted in his appearances before the California Legislature in opposition to the repeal of capital punishment. In fact, Coronet magazine (Jan., 1960, p. 136) described him as "one of the nation's most outspoken advocates of capital punishment."

In the second place, when this statement was published petitioner was not under arrest for, nor charged with, the murder. His name was not mentioned in the statement. It was yet to be determined who would be charged with being the perpetrators of the murder much less who, if anyone, would ultimately be convicted thereof.

Certain it is that not every person who read the statement of the District Attorney was persuaded to his point of view regarding capital punishment. The only reactions received by the newspaper to the published statement were protests against it as evidenced by published letters to the editor on December 24, 1958, December 30, 1958, and January 3, 1959. [Exh. A to affidavit; Tr. of R. 32.] Moreover, 24 out of the

70 prospective jurors examined were excused on challenges for cause because of their conscientious scrupples against the death penalty. Again, it is obvious that if the 24 persons read the statement of the District Attorney, they were not in the least persuaded by it.

An article of December 30, 1958, in the Ventura County Star-Free Press set forth what purported to be the District Attorney's reasons why he would seek the death penalty as to petitioner and his co-defendants. (The fact that the article was not true is indicated by the issue of the same newspaper on February 24, 1959 [Exh. A-14 to declaration; Tr. of R. p. 66], reporting that the District Attorney had not even then stated whether he would seek the death penalty for the co-defendant then being tried.) However, respondent acknowledges that the truth or falsity of the publication is not in issue. The question is whether those who read the article would become so biased that they could not fairly try the petitioner.

The answer seems evident. In any capital case every prospective juror necessarily knows before the trial commences whether the prosecuting attorney will seek the death penalty. This is apparent from the examination of the jurors as to their views with respect to capital punishment. In petitioner's case, where the only issue was punishment, there would have been no trial at all if the District Attorney had not been seeking a death verdict because under California law the punishment would be life imprisonment if the District Attorney agreed to it. (Cal. Penal Code, §1192.3.)

Petitioner seeks to leave the impression that purported comments from the District Attorney of Ventura County were more damaging than they otherwise

would have been because Ventura County is a small, rural area (and presumably everyone knew the prosecutor). This Court can take judicial notice of the 1960 preliminary census figures. They show that of the more than 3,100 counties in the United States, Ventura County ranks in the upper 5% in population. Moreover, of the 38 prospective jurors asked by petitioner's counsel as to whether they knew the District Attorney, only two replied in the affirmative. [Tr. of R. pp. 316, 333.]

Petitioner erroneously assumes not only that the District Attorney actually made the out-of-court statements attributed to him but also that it is misconduct for an attorney to make an out-of-court statement. The fact is that in California there is no rule of professional conduct prohibiting attorneys from making out-of-court statements. (See 34 California State Bar Journal 859 [1959] for a proposal that there be such a rule in California.)

Whether attorneys for the defendants in the three cases actually made out-of-court statements about the cases to newspaper reporters is unknown to respondent. However, the newspaper exhibits before this Court contain no less than 69 reports of out-of-court statements purportedly made by counsel for defendants to newspaper reporters. (See Appendix A.) Typical of the comments reported are those set out in Appendix B.

Even if, contrary to the facts and the California law, this Court concluded (1) that out-of-court statements were made by attorneys on both sides and (2) that the attorneys were guilty of misconduct in making the statements, it must be remembered that the proceedings in this Court are not for the purpose of disci-

plining attorneys by reversal of the judgments of the Supreme Court of California or by any other means. The sole question here is whether petitioner's conviction was had under circumstances depriving him of a fair trial.

It would unduly extend this brief if each of the articles purporting to quote the District Attorney was discussed in detail. Again respondent urges each member of this Court to read the articles and see whether he can conscientiously say that he would thereafter be unable to give petitioner a fair trial.

C. Assuming That Some Published Report Would Cause Every Reader to Become Legally Biased, There Is No Proof That Any Juror Who Served Read That Report.

Obviously nothing that occurred outside of the judicial proceedings and prior to the trial could possibly have affected petitioner's right to an impartial jury unless the event which occurred prevented at least one of the twelve jurors who served from trying the issue fairly and impartially. Petitioner claims that published reports did so. Even assuming that one or more of the publications would have caused every reader to become legally biased, petitioner has not shown that any juror read those particular reports.

Every juror had heard or read something about the case. Exactly what was heard or read was not disclosed. Petitioner's exhibits consisted of certain issues of the daily newspapers of Oxnard, Ventura and Santa Barbara and four daily newspapers of Los Angeles. No juror read all issues of all those papers. No juror was shown to have read every issue of even one of those newspapers. It could well be that no juror read

any of the issues which are exhibits. Petitioner did not attempt to ascertain exactly what any juror read.

Petitioner saw fit to select as exhibits to his application for change of venue only certain issues of certain newspapers. He made no claim that other issues did not contain reports of the case. (In the light of the purpose of the exhibits, it is obvious that petitioner did not include those issues which would show that the newspaper publicity was not such as to interfere with a fair trial.) What any juror read about the case might well, so far as the record is concerned, be entirely in newspapers not tendered as exhibits by petitioner.

Between the date of the first newspaper exhibit (December 15, 1958) and petitioner's trial (April 20, 1959) there were 127 days. Yet petitioner saw fit to include as exhibits only the following numbers of issues of these respective papers:

Ventura Star-Free Press	56
Santa Barbara News Press	22
Oxnard Press Courier	16
Los Angeles Examiner	14
Los Angeles Times	9
Los Angeles Herald Express	5
Los Angeles Mirror—News	1

Each juror was asked what newspaper he read. No one had read the Santa Barbara News Press, the Los Angeles Examiner, the Los Angeles Herald Express or the Los Angeles Mirror—News.

Juror Hanson had "read about this case in the newspapers" [Tr. of R. p. 213], but she was not asked what she read or in what newspaper she read it. Jurors

Hart [Tr. of R. p. 340], Dominy [Tr. of R. p. 319] and DeMarco [Tr. of R. pp. 343, 344] read something about the case in the Los Angeles Times. What they read was not disclosed. Jurors Comstock [Tr. of R. p. 275] and Bailey [Tr. of R. p. 334] read the Oxnard Press Courier, but what they read was not disclosed. The other six jurors read about "the Olga Duncan murder" in the Ventura Star-Free Press. Finnerty [Tr. of R. p. 277]; Wichman [Tr. of R. p. 228]; Caldwell [Tr. of R. p. 310]; Miller [Tr. of R. p. 255]; Hernvall [Tr. of R. p. 261]; Ball [Tr. of R. p. 337]. What they read was not disclosed.

Only two jurors had read any published report of anything the District Attorney allegedly said. Juror Ball said, "I believe I recall [reading] something about" what penalty the District Attorney would ask for. [Tr. of R. p. 337.] Juror Wichman "may have" read something to that effect, but said "I'm not positive." [Tr. of R. pp. 229, 231.]

As to the published report of the trial judge's remarks to co-defendant Baldonado's jury, only Juror Bailey was asked whether he read it and he said he hadn't. [Tr. of R. p. 334.] It is a well known fact that most persons read newspapers only sketchily. Mr. Justice Frankfurter is quoted as saying: "Very few people ever read anything except the headlines." (Phillips, Felix Frankfurter Reminisces, p. 169 [1960].) Public opinion polls constantly show that most persons cannot identify events which are currently the subject of intensive news coverage. Assuming that some particular report is deemed by this Court to be so damaging that anyone who read it would necessarily thereafter be unable to be fair to petitioner, the record is

barren of any showing that any juror definitely read the report.

The law in that situation is clear. In *People v. Chapman*, 93 Cal. App. 2d 365, 372, 209 P. 2d 121, 124 (1949), defendant claimed that a pre-trial newspaper article was so damaging that he could not be fairly tried in Alameda County. The appellate court rejected his claim with the observation that "There is no evidence that any newspaper reports were read by any member of the jury. . . ." This Court denied certiorari. (*Chapman v. People*, 338 U. S. 943, 94 L. Ed. 581, 70 S. Ct. 423 (1950). In *People v. Cook*, 39 Cal. 2d 496, 499, 247 P. 2d 567, 568 (1952), defendant claimed "that prior to the trial the district attorney aroused the prejudice of the people against him by making speeches about the case over the radio and at various civic meetings." Defendant's claim of lack of fair trial was rejected by the Supreme Court of California with the observation that "there is no evidence that any of the jurors who tried the case heard the speeches which were assertedly made."

If this Court believes that some particular article or articles would necessarily cause a reader to become legally biased against petitioner, respondent is at a loss to know how this Court can find that any juror read the offensive matter. The burden is on the petitioner to show that some juror did, not on respondent to show that no juror did.

D. Assuming That at Least One Juror Became Legally Biased by What He Read, There Is No Proof That He Retained That Bias at the Time of Trial.

Suppose, for example, that this Court finds that the article quoting the District Attorney's views on the desirability of retaining the death penalty was so inflammatory that ever reader would necessarily be influenced, consciously or unconsciously, to want to impose the death penalty on petitioner. Suppose further that this Court finds that juror Wichman definitely read the article. The question then is whether (assuming he became biased) he retained that bias to the time of trial.

The article was published December 30, 1958. [Exh. 8 to affidavit; Tr. of R. p. 18.] Petitioner's trial began April 20, 1959—a full third of a year after the publication. California recognizes that the fact that a whole community is aroused against a defendant by newspaper publications some time prior to trial is no proof that a fair and impartial jury cannot be obtained from that community at a later date. (*People v. Yeager*, 194 Cal. 452, 229 Pac. 40 [1924], [offensive publication 17 days before trial]; *People v. Hall*, 220 Cal. 166, 30 P. 2d 23 [1934], [18 days]; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161 [1888], [three weeks]; *People v. Suniga*, 128 Cal. App. 2d 738, 275 P. 2d 914 [1954] [three weeks]; *People v. Mendes*, 35 Cal. 2d 537, 219 P. 2d 1 [1950], [three months]; *People v. Burwell*, 44 Cal. 2d 16, 279 P. 2d 744 [1955], [four

E. Two California Courts Held That the Rublished Reports Would Not Make It Impossible to Obtain a Fair Jury.

Under California law the trial judge is required to grant a motion for change of venue "if a fair and impartial trial cannot be had in the county" where the case is pending. (Cal. Penal Code, §§1033, 1035.) Petitioner made two such motions—one on January 13, 1959, and one on April 16, 1959—supported by the newspaper exhibits now before this Court. Both motions were denied. [Tr. of R. pp. 34, 72.] The trial judge said [Tr. of R. p. 137]:

> ". . . [A]fter carefully analyzing all of the material [the newspapers] submitted to me and after diligently and thoughtfully considering the entire case as far as it has developed up to the present time, I am unable to agree with counsel for defendants in their contention that the defendants cannot receive a fair and impartial trial in Ventura County.
>
> ". . .
>
> "If I had the slightest doubt in the world about the ability of the defendants to receive a fair trial in Ventura County I would without the slightest hestiation grant the motions for a change of venue."

The trial judge thus did not believe that persons who read the newspapers and who thereafter might be called as jurors would be unable to give petitioner a fair trial. The Supreme Court of California was asked by petitioner to rule that the trial judge was wrong in this conclusion. Instead, that court affirmed

the rulings of the trial judge denying the motions for change of venue. (*People v. Moya*, 53 Cal. 2d 819, 350 P. 2d 112 [1960].)

The California Supreme Court is well aware of the requirement that trial be had before impartial jurors. In *People v. McKay*, 37 Cal. 2d 792, 236 P. 2d 145 (1951), the trial judge denied a motion for change of venue. Defendants' convictions by a jury were reversed by the Supreme Court for failure of the trial judge to order a change of venue. The court said:

> "However conscientious the members of the jury might have been, it cannot reasonably be concluded that they could so divorce themselves from their past experiences and present surroundings that a fair and impartial trial could be had."

Eight California judges (the trial judge and seven justices of the Supreme Court) examined the newspapers now before this Court and not one found that the newspaper articles were such as to prevent prospective jurors from being fair. These views should be entitled to great weight in this Court.

F. Petitioner at the Trial Did Not Believe That Any Juror Was Legally Biased.

Seventy prospective jurors were examined in petitioner's case. This is not a large number for a capital case. Only 18 of those had formed opinions on the matter in issue, that is, what penalty should be applied for the murder to which petitioner had pleaded guilty. Nine of these said their opinions were fixed and they were all excused on challenges for cause by petitioner! The other nine prospective jurors said their opinions were not fixed and they could fairly and impartially

try the case. Nevertheless, *most* of these nine were excused on peremptory challenges by petitioner.

A ground of challenge to a juror is "the existence of a state of mind on the part of the juror in reference to the case, or to either of the parties, which will prevent him from acting with entire impartiality and without prejudice to the substantial rights of either party." (Cal. Penal Code, §1073.) Petitioner was well aware of this ground because he invoked it nine times. Every time he invoked it, his challenge was allowed. Not one person who ultimately was selected as a juror was challenged by petitioner for that or any other reason. Certainly this is extremely strong evidence of petitioner's then belief that neither the newspaper articles nor anything else resulted in bias, partiality or prejudice in any juror who served.

A second indication of petitioner's attitude is his failure to move for a change of venue after the jury was selected. The trial judge expressly left that action open to him. [Tr. of R. pp. 72, 191.] If petitioner thought he could not get a fair trial because the jurors selected were biased, he would have then renewed his motion. That he did not is strong evidence of the fact that there is no basis for his present charge that the jurors were biased. (*Stroble v. California*, 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 [1952].)

Finally, when petitioner moved for a new trial he did not claim as one of the grounds that he had been deprived of a fair trial by reason of the bias of the jurors due to newspaper publicity. [Tr. of R. pp. 175-184.]

G. Summary.

In *Stroble v. California,* 343 U. S. 181, 96 L. Ed. 872, 72 S. Ct. 599 (1952), this Court was considering a California murder conviction which was preceded by intense newspaper publicity. Petitioner there had been described in the newspapers as a "werewolf," a "fiend" and a "sex-mad killer". His confession had been released by the District Attorney who also announced to the press his belief that petitioner was guilty. In finding that petitioner was not deprived of a fair trial, this Court said (p. 606):

> ". . . Indeed, at no stage of the proceedings has petitioner offered so much as an affidavit to prove that any juror was in fact prejudiced by newspaper stories. He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do, at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury."

In the case at bar there is no affidavit that any juror was in fact prejudiced. The newspaper accounts of which petitioner complains were published almost four months before the beginning of petitioner's trial. No hostile acts or other facts were shown which indicated any community, as opposed to individual, prejudice. Neither the victim nor petitioner was a resident of the county of trial. Petitioner points to no statement of fact in any newspaper story which was not

borne out by the evidence introduced at his trial. The publication of petitioner's confessions, taken from the public records of the testimony before the grand jury, could in no event have harmed petitioner since he publicly, in open court before the trial, pleaded guilty to the crime.

In *United States v. Handy*, 351 U. S. 454, 100 L. Ed. 1331, 76 S. Ct. 965 (1956), petitioner claimed he had been deprived of a fair trial by newspaper publicity. This Court said (p. 970):

> "[P]etitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. . . . [W]e are asked to read the news reports and the testimony as to other incidents and to find, contrary to the Supreme Court of Pennsylvania and two federal courts, that these reports and incidents did create such an atmosphere that it infected the jurors and deprived petitioner of a fair trial on the evidence presented to them. We see no justification in the record to warrant our so finding."

In the case at bar, all of the newspaper articles were presented to the trial judge *before* the trial and he decided that they would not necessarily prevent the selection of fair and impartial jurors. The record affirmatively shows that all of the twelve jurors finally selected said they could and would be fair and impartial notwithstanding what they read and that petitioner be-

lieved them because he did not challenge a single one for cause nor did he thereafter move for a change of venue. The Supreme Court of California held that the newspaper accounts were not such as to have required the trial judge to grant petitioner's motions for change of venue.

In order to reverse the judgment, this Court would have to do the following things:

1. Find that one or more of the newspaper articles were so inflammatory that every reader would be prejudiced against petitioner.

2. Find that at least one juror read the particular articles deemed to be offensive.

3. Find that the prejudice thereby engendered in that juror continued from the date of reading to the date of trial.

4. Find that the juror falsely stated under oath that he could and would give petitioner a fair trial.

5. Find that petitioner's failure to challenge any juror (for cause or otherwise) or to move for a change of venue after the selection of the jury is of no significance.

Respondent submits that there is nothing in the record which would support such findings.

Respondent does not claim that the publicity did not result in some prospective jurors becoming biased. It obviously did because nine prospective jurors admitted that they had fixed opinions. But respondent does claim that from the fact that some persons become biased, it does not follow that all others must neces-

sarily be likewise biased. Not all persons are persuaded to identical conclusions by the same article or the same speech.

The newspaper publicity in the case ar bar admittedly gave rise to the opportunity for some prospective jurors to reach fixed opinions as to what penalty petitioner should suffer. But as Mr. Justice Holmes, writing for this Court, stated in *Holt v. United States,* 218 U. S. 245, 251 54 L. Ed. 1021, 1029; 31 S. Ct. 2 (1910), "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

What was recently said in *Irvin v. Dowd,* 271 F. 2d 552, 554-555 (C. A. 7th Cir., 1959), certiorari granted 4 L. Ed. 2d 542 (1960), is appropriate (p. 554):

> ". . . It is not surprising that, the more extensive the news coverage of crime and the more wanton and unjustified the crime itself, the greater and more extensive is the indignation of citizens. Such indignation, varying in its degree according to the violence of the crime, and geographically extensive with the area of news distribution, undoubtedly causes many people to form impressions or beliefs as to the guilt or innocence of suspected or indicted persons. In these days of widely effective and thorough news distributing instrumentalities, such as the telephone, newspaper, radio and television, as well as rapid travel of persons by automobiles, trains and airplanes, hardly a person anywhere in a state, or in fact in the United

States, is long ignorant of the details of crimes committed in any state (or in this country), unless he be completely mentally incompetent or is in solitary confinement in a jail. In fact, it may well be that into the latter place the grapevine reaches. We no longer live in a day when what happened in the next county was learned only by conversation with a traveling man or a brakeman on the way freight train. It is into this modern society with facilities for quick and broad news coverage that a person who commits six murders projects himself. When apprehended, he is entitled to a fair trial and is to be accorded due process of law, according to the existing circumstances.

"Our problem in its last analysis is whether the general resentment of a people following the publication by news distributing media of information in regard to a series of murders may be relied upon to prevent the state from prosecuting a person indicted for these crimes, even though his trial be held before an unbiased judge and a jury is selected in accordance with established principles applicable to such a case. If the state is so prevented from trying such a person, it means that the commission within a state of a multiplicity of criminal acts, followed by the usual publicity, actually immunizes the offender from prosecution. We reject such a conclusion as the law of this circuit."

It is of particular significance that in the present case nothing appeared in the newspapers that was not

brought out during the trial. If the newspapers had published some particularly damaging facts about petitioner which either were not, or could not have been, introduced as evidence at the trial, the possibility of prejudice would have been increased. But here this Court must determine whether petitioner was deprived of a fair trial by pre-trial newspaper accounts of facts all of which (together with many more) the jurors ultimately heard from witnesses.

If such accounts are held to deprive an accused of a fair trial, then a long step in the indirect censorship of the press will have been taken. Public officers will conceal all information from the press (even though experience demonstrates that many crimes are solved and many wanted criminals are located through news items) for fear that publication of the information would jeopardize the ultimate trial of the accused. California will be forced to change its laws so that transcripts of preliminary examinations and grand jury hearings, which are now public records, will be made secret. (Even so, enterprising newspapers could nevertheless jeopardize a trial by printing information about a crime obtained from lay witnesses and other non-public sources.) Except for holding the newspaper in contempt of court, this Court will have for all practical purposes effectively forbidden the publication of facts about the most interesting, significant and important criminal cases in this country. (Obviously, the minor, routine, unimportant cases get little or no publicity.)

It is no answer to say that where newspapers have given intensive publicity to a case, the trial should be delayed or moved to a different county. If the case is

of widespread interest, the same publicity can be expected even though the trial takes place at a different time or place from that originally scheduled. Neither is it any answer to say that if the trial takes place as scheduled, a new trial should be granted. Again, it is naive to believe that similar publicity would not accompany the new trial.

When, as here, there is no editorializing, no demands for a particular result, no slanting of the news, no untrue statements, no publication of inadmissible facts and when, as here, the publicity does not result in any threat of violence, display of emotions or other conduct indicating an inflamed community, then the mere extensive news coverage should not be held to have deprived a defendant of a fair trial.

Finally, one important distinction should be noted between the case at bar and cases arising from federal trial courts. In *Marshall v. United States,* 360 U. S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959), newspaper articles read by jurors during the trial were held to be so prejudicial that a new trial was granted by this Court. However, this Court acted in the exercise of its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts". It did not invoke the Due Process Clause (of the V amendment). While this Court undoubtedly would invoke the Due Process Clause (of the XIV amendment) to reverse a state conviction if pre-trial publicity deprived a defendant of a fair trial, it has never done so. Respondent submits that there is less basis for doing so in the instant case than in other cases which have been before this Court.

II.

Was There a Violation of Petitioner's Right to a Fair Trial, as Guaranteed by the Due Process Clause of the XIV Amendment of the Constitution of the United States of America, Where in a Trial of a Capital Offense by Jury, the Trial Court Permitted to Remain in the Jury Box and Sit in Judgment, Three Jurors Who Had Entered the Jury Box With Fixed Opinions as to Petitioner's Guilt, and Retained Such Opinions While Being Examined on Voir Dire?

The most truthful statement in petitioner's brief is that this "question certified for review does not involve this petitioner". Nevertheless, petitioner attempts to dilute this admission by unfounded statements such as that "the jury, as constituted, was composed of six regular jurors with opinions as to what penalty should be imposed upon petitioner" and that "five of the twelve regular jurors had formed an opinion as to what penalty should be imposed upon petitioner based on reports of public news media."

The facts are that (1) every prospective juror challenged for bias or for any other cause by petitioner was excused; (2) every prospective juror challenged peremptorily by petitioner was excused; (3) when the twelve jurors were sworn, petitioner failed to move for a change of venue on the ground of bias of the jurors or on any other ground; (4) in moving for a new trial, petitioner did not claim that a single juror was biased or otherwise disqualified.

In the light of the record and petitioner's concession, there is no need for respondent to waste this Court's time by laboring the point.

III.
Other Points Raised by Petitioner Are Not Before This Court.

Petitioner devotes an entire section of his brief to the argument that the trial judge erred in (1) denying motions for change of venue and (2) in other pertinent matters.

Respondent understands that this Court deliberately limited certiorari to the question of whether petitioner was deprived of a fair trial because of the pre-trial publicity. If he was, the judgment should be reversed regardless of whether petitioner moved for a change of venue. If he was not, the judgment should be affirmed regardless of whether petitioner moved for a change of venue. The only importance of petitioner's moving, or failing to move, for a change of venue is petitioner's *then belief* of the fairness of the jury.

Before any jury panel appeared in court, petitioner unsuccessfully moved for change of venue. The denial of his motions was entirely proper (and so held by the California Supreme Court) because the trial judge reasonably believed that he should not declare that an impartial jury could not be obtained until he had unsuccessfully tried to obtain one. When the jury in this case was obtained, petitioner acknowledged that the jury was impartial because he did not then move for a change of venue—a course which had expressly been left open to him.

As to the trial judge's errors "in other pertinent matters", petitioner says that these "were cited as error . . . by way of petition for writ of certiorari." In his

petition for certiorari, petitioner threw in "everything but the kitchen sink". Despite having been limited to one question by this Court, petitioner insists on seeking to evade this limitation by again bringing up the entire record. Respondent chooses not to answer these matters in the firm belief that this Court meant what it said when it limited certiorari.

Conclusion.

The facts concerning the murder of Olga Duncan were most unusual. It was therefore only natural that the case attracted world-wide attention through news media. Petitioner admitted his guilt of first degree murder and he has at no time questioned the sufficiency of the evidence to support the verdict decreeing that his penalty should be death.

This Court now asks whether petitioner was deprived of a fair trial. He obviously was not unless the publicity was such that one or more jurors had a *fixed* opinion on the issue of penalty before the case was heard. The California Supreme Court put the matter succinctly: "Even if it be assumed that many persons formed opinions unfavorable to defendant as a result of what was published, it does not follow that persons without such views could not be found to act as jurors or that those who had adverse opinions would be unable to set them aside and try the case fairly on the basis of the evidence to be produced in court." (*People v. Duncan*, 53 Cal. 2d 803, 812, 350 P. 2d 103, 108 (1960).)

After examination of the jurors it was clear that there were nine who had formed no opinions whatever

and that there were three who would be able to set aside whatever opinions they had and decide the case solely on the evidence. Petitioner did not challenge a single one of the twelve jurors. He did not move for a change of venue after the twelve jurors were selected and before they were sworn. He did not at any time in the proceedings in the state courts claim that any one of the twelve jurors who actually tried the case was not fair and impartial.

Petitioner's motions for a change of venue, made *before* the twelve jurors were selected, can only be interpreted as a claim that all persons called as jurors who might say that they had no opinions actually would have fixed opinions adverse to petitioner and as a claim that all persons called as jurors who might say that they could and would set aside their opinions actually could not or would not be able to do so. These claims, made before any jurors were examined, that it would be impossible to find twelve impartial jurors were rejected by the trial judge when he denied petitioner's motions. They were rejected by the Supreme Court of California when it upheld the trial judge's rulings.

Respondent respectfully submits that there is nothing in the record which warrants this Court finding that the jurors who served were not fair and impartial despite their statements that they would be and despite petitioner's failure to challenge any one of them or to move for a change of venue after they had been examined. Nor is there anything in the record to warrant this Court finding that the trial judge and the Supreme Court of California were wrong in believing that

petitioner did not demonstrate, prior to the examination of the jurors, that it would be impossible to find in Ventura County twelve persons who could and would fairly and impartially try the case as jurors.

Respectfully submitted,

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WILLIAM E. JAMES,
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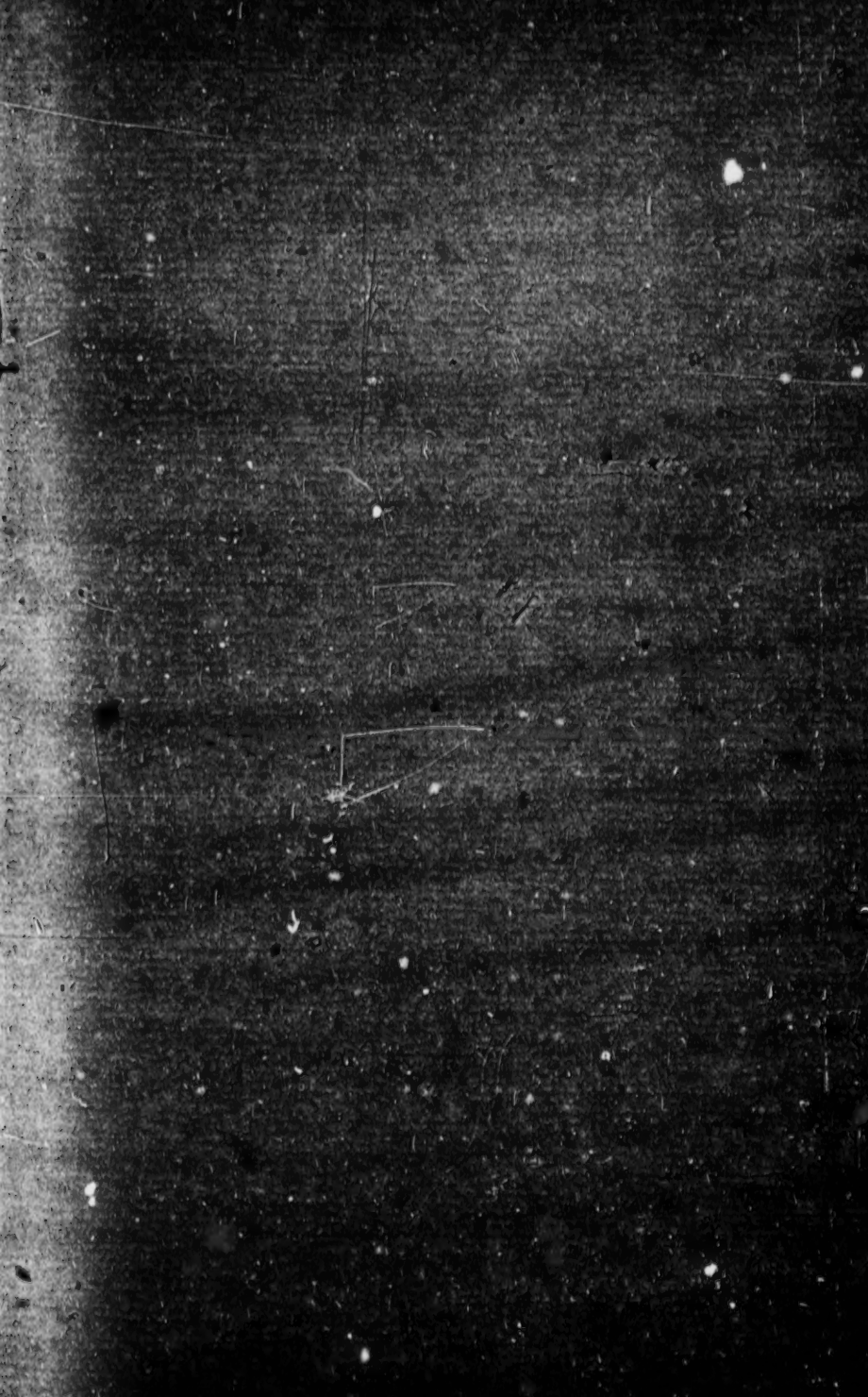

APPENDIX A.

Attorneys defending the three charged with the murder of Olga Duncan were: for Baldonado, John Danch; for Moya, Burt Henson; for Duncan, S. Ward Sullivan and Frank Duncan (the latter being formally made attorney of record on March 24, 1959). All are attorneys of record on this appeal.

For the convenience of this Court, the publications in this record in which it is reported that statements pertaining to the case were made out of court by attorneys for the defendants are here tabulated:

Date	Newspaper	Page	Exhibit	Attorney Quoted
12-22-1958	Ventura Star-Free Press	A-1	3	Sullivan
22	Los Angeles Times	25	30	Sullivan
22	Los Angeles Herald Express	A-4	10	Sullivan
23	Ventura Star-Free Press	A-1	16	Sullivan
23	Oxnard Press Courier	A-1	25	Sullivan
23	Los Angeles Times	1	31	Sullivan
24	Ventura Star-Free Press	A-1	17	Sullivan
24	Oxnard Press Courier	A-3	4	Sullivan
26	Oxnard Press Courier	A-1	26	Duncan
27	Ventura Star-Free Press	A-1	5	Duncan
27	Oxnard Press Courier	A-1	6	Duncan
27	Los Angeles Times	4	7	Duncan
29	Ventura Star-Free Press	A-1	9	Sullivan
29	Ventura Star-Free Press	A-1	9	Duncan
30	Ventura Star-Free Press	A-1	8	Sullivan
31	Ventura Star-Free Press	A-1	19	Danch
1- 7-1959	Los Angeles Examiner	1	2	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
12	Ventura Star-Free Press	A-1, A-4	S-A p. 1	Sullivan
12	Ventura Star-Free Press	A-1	S-A p. 1	Henson
12	Ventura Star-Free Press	A-1	S-A p. 1	Danch
13	Ventura Star-Free Press	A-1	A-1	Sullivan
20	Ventura Star-Free Press	A-1	A-3	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Henson
29	Oxnard Press Courier	A-1	S-A p. 1	Danch
29	Ventura Star-Free Press	A-1	A-4	Sullivan
29	Ventura Star-Free Press	A-1	A-4	Henson
29	Ventura Star-Free Press	A-1	A-4	Danch
2– 2–1959	Ventura Star-Free Press	B-1	A-6	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Sullivan
12	Oxnard Press Courier	A-1	S-A p. 8	Danch
14	Ventura Star-Free Press	A-1	A-7	Sullivan
16	Ventura Star-Free Press	A-2	A-9	Danch
16	Santa Barbara News Press	A-1	A-63	Duncan
17	Ventura Star-Free Press	A-4	A-11	Sullivan
17	Ventura Star-Free Press	A-1	A-11	Duncan
18	Ventura Star-Free Press	A-1, A-3	A-40	Sullivan
19	Ventura Star-Free Press	B-8	A-12	Sullivan
20	Ventura Star-Free Press	A-1	A-13	Sullivan
21	Ventura Star-Free Press	A-1	A-41	Sullivan
24	Ventura Star-Free Press	B-1	A-14	Sullivan
26	Ventura Star-Free Press	A-16	A-16	Duncan
26	Ventura Star-Free Press	A-1	A-16	Sullivan
26	Santa Barbara News Press	A-1	A-19	Duncan

Date	Newspaper	Page	Exhibit	Attorney Quoted
26	Los Angeles Times	32	A-84	Sullivan
27	Ventura Star-Free Press	A-1	A-43	Duncan
27	Ventura Star-Free Press	A-1	A-43	Sullivan
27	Los Angeles Examiner	1	A-62	Danch
27	Los Angeles Examiner	1	A-62	Duncan
3- 2–1959	Santa Barbara News Press	A-7	A-69	Sullivan
3	Ventura Star-Free Press	A-1	A-46	Sullivan
4	Ventura Star-Free Press	A-1	A-23	Sullivan
6	Santa Barbara News Press	A-8	A-20	Duncan
9	Ventura Star-Free Press	A-1	A-49	Sullivan
9	Oxnard Press Courier	A-1	A-86	Sullivan
9	Santa Barbara News Press	A-1	A-72	Sullivan
11	Los Angeles Examiner	1	A-32	Sullivan
16	Santa Barbara News Press	A-1	A-76	Sullivan
17	Ventura Star-Free Press	A-1, A-7	A-37	Duncan
17	Ventura Star-Free Press	A-1	A-37	Sullivan
21	Ventura Star-Free Press	A-1	A-36	Duncan
21	Ventura Star-Free Press	A-1	A-36	Sullivan
21	Oxnard Press Courier	A-1	A-35	Duncan
21	Oxnard Press Courier	A-1	A-35	Sullivan
21	Santa Barbara News Press	A-6	A-80	Duncan
21	Santa Barbara News Press	A-6	A-80	Sullivan
21	Los Angeles Examiner	1	A-34	Duncan
21	Los Angeles Examiner	16	A-34	Sullivan
24	Ventura Star-Free Press	A-1	A-59	Sullivan

APPENDIX B.

The nature of the reported statements by defense attorneys to newspapers is illustrated by the following excerpts:

"Frank later rapped what he called the political ambitions of the district attorney. 'There was no question that there was political ambition in this,' he said. 'He intends to climb to some higher position over my mother's body.' "

(p. A-1 Ventura Star-Free Press March 21, 1959, Ex. A-36.)

"Frank Duncan was barred yesterday from seeing his mother, Mrs. Elizabeth Duncan, now in county jail awaiting trial. . . .

"Duncan was visibly disappointed and angered by the refusal. He termed it 'extraordinary' and said it was 'uncalled for'. 'There is no justification for it,' he added. 'It smacks of the thumb and the screw—I mean, the rack and the screw.'

"Sullivan told newsmen that the bar to outside visitors would hamper preparation of his case. . . .

"He said he saw the 'handwriting' of District Attorney Roy A. Gustafson behind [Sheriff] Hill's orders yesterday. . . .

"[Duncan] said he had not read anything in any newspaper since last seeing his mother on December 20—six days before she was indicted in the slaying plot . . . to change his opinion of her innocence.

" 'Just because she is accused does not mean she is guilty,' he said. . . .

"Sullivan and Duncan also revealed yesterday that shortly after the 31-year old attorney was born, his mother was in a sanitarium."

(p. A-1 Ventura Star-Free Press, January 12, 1959, Sullivan, Ex. A p. 1.)

"Defense Counsel Sullivan reported he was somewhat startled, when going into the jail to visit his client, to hear the jailer call out the name of a prisoner. 'Gustafson,' the jailer called. 'Gustafson, come here.'

"Sullivan stopped and said: 'Would you mind telling me the first name of that fellow?'

"No, it wasn't Roy A."

(p. B-1 Ventura Star-Free Press, February 24, 1959, Ex. A-14.)

"Frank Duncan leveled this blast at Gustafson: 'There is no question but that he intends to climb to some higher political position over the body of my mother! Never, as a lawyer, did I think I would see such hatred, bias and prejudice in any court in the United States.'"

(p. A-6 Santa Barbara News Press, March 31, 1959, Ex. A-80.)

"Her son Frank . . . told the News Press this morning he is sure that the woman charged with killing his young wife is innocent.

"'After I read the complete Grand Jury transcript,' he said, 'I am fully convinced that my mother is innocent of the charge.' He also said he has 'the greatest concern' that she will not get a fair trial in Ven-

tura County, based on wide publicity given events which have gone before."

(p. A-1 Santa Barbara News Press, February 16, 1959, Ex. A-63.)

"District Attorney Roy Gustafson was accused of 'going a long way' to prejudice any jury that would hear the Duncan murder case.

"The accusation came from Mrs. Elizabeth Duncan's defense attorney, S. Ward Sullivan, who charged that Gustafson's public statements . . . using this case as an argument in favor of capital punishment are a very obvious effort to influence a verdict.

" 'His remarks,' Sullivan said, 'certainly will influen potential jurors in Ventura County. Gustafson is going a long way to see that these defendants do not receive a fair and impartial trial at the hands of an unbiased and unprejudiced jury.' "

(p. A-1 Ventura Star-Free Press, December 30, 1958, Ex. 8.)

"The following statement was handed to reporters by attorney Burt Henson this morning . . . 'One thing that troubles me about this case is the fact that the district attorney appears to be following a course of selective prosecution and selective retribution. It appears as though the district attorney is again deciding who is to be prosecuted and who shall be a target of retribution.' "

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Mr. Sullivan told the Press Courier just before court convened today that the district attorney has been guil-

ty of prejudicial conduct 'in offering what he knew or should have known was incompetent and irrelevent [*sic*] evidence, entered for the purpose of degrading and debasing my client in the eyes of the jury.'"

(p. A-1 Oxnard Press Courier, March 9, 1959, Ex. A-86.)

"Sullivan who talked for two hours to Mrs. Elizabeth Ann Duncan, 54, today, said tonight:

"'I firmly belief that these two men maintained a bitter grudge toward the Duncan family and they resorted to murder in an attempt to blackmail this poor woman.'"

(p. 1 Los Angeles Times, December 23, 1958, Ex. 31.)

"Sullivan emerged from an hour and a half conference with Mrs. Duncan this afternoon to announce that he is convinced she is not guilty and that he will so plead her.

"He said he is convinced she had nothing to do with her daughter-in-law's disappearance and demise, but that he forsees [*sic*] a long trial, possibly two or three weeks."

(p. A-4 Los Angeles Herald Express, December 22, 1958, Ex. 10.)

"Duncan said . . . 'It's inconceivable that mother could associate with a man like that. It sounded like something that might be done in Chicago—not in Santa Barbara.

"'What a cold-blooded man (Moya). I'd like to lay my hands on that————————————.'"

(p. 1 Los Angeles Examiner, February 27, 1959, Ex. A-62.)

"Sullivan said it appeared to him that Gustafson had done 'a good job in educating the people of Ventura County on his views of capital punishment.'"

(p. A-1 Ventura Star-Free Press, February 18, 1959, Ex. A-40.)

"Said Sullivan: 'This is the clearest case of a miscarriage of justice that I have ever tried in my more than 30 years as a trial lawyer. There is more glaring error in this record than in any case I have ever tried.' . . .

"Of his client he said, 'I don't think she comprehends what happened. All she knows is that she was tried before a biased and prejudicial jury.'"

(p. A-1 Ventura Star-Free Press, March 21, 1959, Ex. A-36.)

"Frank Duncan said he had been reared very carefully by his mother, 'She taught me always to stick up for the under dog, not to hurt anyone, particularly the helpless. She was a very sensitive person—she couldn't stand to see a chicken killed,' he said."

(p. A-1 Ventura Star-Free Press, December 27, 1958, Ex. 5.)

"S. Sullivan, prominent Los Angeles attorney, disclosed that Mrs. Duncan's defense will probably be that she was being blackmailed by Baldonado and Moya."

(p. A-1 Oxnard Press Courier, December 23, 1958, Ex. 25.)

"S. Ward Sullivan, Mrs. Duncan's attorney, said he would 'just as soon' have both Baldonado and Moya plead guilty.

" 'We would prefer to go to trial without those two,' Sullivan said."

(p. A-1 Ventura Star-Free Press, January 29, 1959, Ex. A-4.)

"Frank Duncan had bitter comments after court about Moya's conversion. 'He claims to have religion now, yet he told about killing my wife with no more emotion than if he were ordering his lunch,' Frank said.

"He had said earlier it was inconceivable his mother could associate with a man like that."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan said he regards the Duncan case as one of the most interesting he has handled.

"He said his client has consistently stated to him that she is innocent. The main difficulty from a defense standpoint that he sees right now is in impaneling an impartial jury to try her.

"He feels statements by the District Attorney have seriously prejudiced the average Ventura County citizen against Mrs. Duncan."

(p. B-1 Ventura Star-Free Press, February 2, 1959, Ex. A-6.)

"Young Duncan greeted his mother again in the courtroom and took the opportunity to make several statements to the press. He said for one thing his mother, and other women prisoners in the county jail, are not allowed to read Ventura County newspapers on the belief they would obtain information concerning developments in cases in which they are involved.

"He also branded as 'hogwash' reports that his mother is accumulating a cache of sleeping pills and other drugs in her jail cell as a possible suicide preparation in case the murder trial goes against her."

(p. A-1 Ventura Star-Free Press, February 17, 1959, Ex. A-11.)

"Frank Duncan told reporters after the session that he did not learn of the phony annulment until many weeks after it was granted."

(p. A-16 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"S. Ward Sullivan, veteran criminal lawyer, said today he will enter a plea of 'not guilty' for Mrs. Elizabeth Duncan . . . 'She denies having any part of the killing of Olga Duncan,' Sullivan said.

"He said she admitted having met both Augustine Baldonado and Luis Moya who are believed to have committed the actual killing. . . .

"Sullivan said that 'she feels someone else is trying to involve her in the murder.' . . .

"Asked what the feeling was between the two women, the son's wife and the mother-in-law, Sullivan said that there was no indication of hatred on the part of Mrs. Duncan. 'She has told me however, that there was no love lost between them."

(p. A-1 Ventura Star-Free Press, December 22, 1958, Ex. 3.)

"The Los Angeles attorney said there are a great number of facts in the matter which have not as yet been presented and which he feels will place a new light on the whole proceedings. . . .

"Sullivan said his client is maintaining a calm attitude outwardly but that she has obviously been hard-hit by the aspects of the charges against her. 'She has lost 12 pounds since being placed in custody.' Sullivan said. 'She would, of course, rather be spending her holiday season with her son and friends than in jail.' "

(p. A-1 Ventura Star-Free Press, December 24, 1958, Ex. 17.)

"Sullivan has told reporters one of his arguments will be that all of the testimony against Mrs. Duncan is from people who were admitted accomplices in the crime of murder, and that the law requires independent, corroborative evidence from people who were not directly involved."

(p. A-1 Ventura Star-Free Press, February 27, 1959, Ex. A-43.)

"Sullivan contends all who have testified to details of the alleged murder scheme up to now have branded themselves accomplices by their own testimony."

(p. A-1 Ventura Star-Free Press, March 3, 1959, Ex. A-46.)

"Earlier, Mrs. Duncan's attorney, S. Ward Sullivan, said he will demand a mistrial in the four-week-old trial, citing what he called 'misconduct of the district attorney.' . . . '[H]e knows the jury cannot exclude these matters from their minds,' Sullivan said."

(p. A-1 Ventura Star-Free Press, March 9, 1959, Ex. A-49.)

"Young Duncan refused to say what he thought about his mother's involvement. . . .

"'My mother would have to be insane to be linked into this . . .' he said."

(p. A-1 Oxnard Press Courier, December 26, 1958, Ex. 26.)

"Sullivan said later he had talked to her [Mrs. Duncan] about the verdict. . . .

"'She isn't surprised at the verdict,' he said, 'because she realizes she had to go to trial before a jury that was already biased and prejudiced, and she couldn't expect anything else from the outset of the trial.'"

(p. A-6 Santa Barbara News Press, March 21, 1959, Ex. A-80.)

"John Danch, Ventura attorney for Baldonado, said he expects the trial to take at least two weeks. He hopes the three defendants will be tried together, but anticipates Mrs. Elizabeth Duncan's attorney, S. Ward Sullivan, may seek a separate trial for his client.

"Danch says he feels it may be difficult to obtain an impartial jury in Ventura County."

(p. A-1 Ventura Star-Free Press, December 31, 1958, Ex. 19.)

"Sullivan said today Mrs. Duncan definitely will take the stand to testify in her own behalf, when the defense presents its case. Under the law, she cannot be required to do so."

(p. A-1 Ventura Star-Free Press, February 26, 1959, Ex. A-16.)

"Baldonado's attorney, John Danch, Ventura, said he plans to advise the former Camarillo resident against making any admissions in the Duncan trial starting today."

(p. A-2 Ventura Star-Free Press, February 16, 1959, Ex. A-9.)

FILE COPY

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PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 186

LUIS ESTRADA MOYA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

REPLY BRIEF FOR THE PETITIONER

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Introduction

In summary, petitioner's position is that he was denied due process by the State of California; that due process, particularly in a capital case, is denied when a trial is influenced by prejudicial action of the district attorney and other state officers; that pre-trial news publications engendered a community atmosphere wherein petitioner could not be afforded a fair trial; that the principal source of the pre-trial publications was the district attorney and other state officers; that the character of the published material was highly inflammatory and prejudicial; that the trial judge did not act reasonably in denying motions for change of venue; and that the trial judge contributed

to the community hostility by permitting courtroom photography and by published comments concerning change of venue and by his published comments approving death verdicts in cases of two co-defendants.

Respondent replies with a variety of contentions; that petitioner's brief is completely misleading; that the conduct of the district attorney in releasing prejudicial material for publication is not in issue; that the material published ultimately was brought out in trial; that there was no proof that any juror who served was affected by the pretrial publications; that the trial judge acted reasonably in denying change of venue; and that petitioner at time of trial did not believe that any juror was biased.

I.

Petitioner's Brief Fairly States the Facts.

Respondent begins with a bald assertion that "Moya's brief distorts the facts, go beyond the record and is completely misleading." In support of this blanket accusation, respondent cites several claimed misleading statements.

Respondent contends that petitioner and co-defendants were not arrested for murder until after indictment on December 26, 1958. It is clear that petitioner and co-defendants were arrested on or before December 15, 1958, primarily as murder suspects and only incidentally for other technical reasons as reported in news publications.

Exhibit 11, Star-Free Press, Dec. 15, 1958:

> "But there were indications of more serious charges. Said Woodruff J. Deem, chief criminal deputy of the district attorney's office: 'When we have a suspected murder case, we don't give hints.'"

Exhibit 13, Star-Free Press, Dec. 18, 1958:

"'I feel very strongly,' Gustafson said, 'that there might not have been any disappearance (of Olga Duncan) had we been able to move on the case in October.' . . . The possibility of homicide was voiced yesterday in court by Gustafson as he opposed bail reduction on Elizabeth Duncan."

"Gustafson opposed the reduction of bail, drawing a parallel between the Duncan case and the L. Ewing Scott case in Los Angeles recently. He pointed out that when Scott's bail was reduced to $25,000, the suspect in his wife's murder left the country."

Exhibit 15, Star-Free Press, Dec. 20, 1958:

"The weird Olga Duncan disappearance case took an important turn late yesterday in Santa Barbara when her mother in law (Elizabeth Duncan) and two men (Moya and Baldonado) were charged with conspiracy to commit murder and kidnapping."

Exhibit 16, Star-Free Press, Dec. 23, 1958:

"Gustafson said he discounted the blackmail claim and observed that as far as he was concerned the only reason Moya and Baldonado sought money from Mrs. Duncan was because 'they wanted the pay they were promised for the job they did.'".

The reason why petitioner and co-defendants were not formally charged with murder was apparently explained to the press by the district attorney as reported in Exhibit 18, Star-Free Press, Dec. 26, 1958:

"Gustafson now had all three central figures in the slaying case in jail, but not as suspects in a murder. All were booked on other charges. Mrs. Duncan as a

suspect in a fake annulment scheme, Moya as a parole violator, and Baldonado on failure to provide. This allows Gustafson to call all before the Grand Jury in the inquisition into Olga's murder. As defendants they could not be called. Now they must either testify or state their reasons which can only mean fear of self-incrimination."

Under California law, a person could be called as a witness before a Grand Jury and even though the Grand Jury was summoned to investigate charges against that person, he could not refuse to be sworn as a witness. *In re Lemon*, 15 C.A. 2d 82, 59 P. 2d 213.

Respondent accuses petitioner of stating falsely that the population of Ventura County was approximately 170,000. Respondent apparently overlooked the fact that he introduced the affidavit of Volney Cummins in connection with hearing on change of venue, which affidavit contained the following statement: "The population of Ventura County is approximately 170,000" (TR 26). The Federal Census shows a population of 199,138 in 1960 and a population of 114,647 in 1950. The estimated population according to the State of California Department of Finance as of January 1, 1959, was 180,400. (*Directory of State Services of the State of California* 1959.)

Respondent further complains that petitioner is misleading the court for the reason that petitioner did not quote from all the newspaper exhibits, and further that petitioner did not introduce all newspaper exhibits carrying accounts of the case. The record shows that during the two separate hearings on change of venue, respondent introduced no newspaper exhibits whatever himself. He certainly cannot seriously complain at this time about the absence of newspaper exhibits. Further, it would have

been practically an impossibility to introduce all newspapers carrying accounts of the case. As for petitioner's objecting to a courtroom photograph, the record is clear that petitioner made his first motion for change of venue as early as January 13, 1959, on the specific grounds that prejudicial pre-trial publicity would prevent a fair trial in Ventura County. This should have served as a clear and adequate objection to further pre-trial publicity including, of course, courtroom photography. Petitioner was not in a position to specifically object in the trials of co-defendants Duncan and Baldonado because he was not a party litigant in either trial.

With respect to the tape recorded confession of petitioner, respondent falsely states that the contents of the tape recording "were not released to the public by any law enforcement personnel." This court's attention is invited to the following in Exhibit 18, Star-Free Press, December 26, 1958:

> "Moya reportedly told about the same story as Baldonado of the murder. Gustafson said the confession revealed the pair had driven to the apartment of Olga on November 18 and that Moya had gone to the door, telling the attractive nurse that her husband, Frank, from whom she was estranged, was in the car and wanted to talk to her."
>
> "Higgins, a 40 year old ex-torpedoman in the Navy, not retired, became a local hero in the proceedings when he obtained the confession despite the fact that he failed an examination for promotion recently and is the lowest paid deputy.
>
> "Moya's confession added the last few pieces to the puzzle which had confronted investigators in the bizarre killing-for-hire and pinpointed the method in

which Olga was lured to her death. He said Mrs. Duncan promised $6,000 for the job.

"He said he went to Olga's apartment, told her that her husband Frank wanted to see her in a car outside. She came to the car in bathrobe and nightgown, looked in the car to find Baldonado and not her estranged husband, at which time Moya said he struck her with a borrowed .22 caliber pistol as Baldonado dragged her into the car."

"Moya, like Baldonado before him, told officers they were hired by Mrs. Elizabeth Dun, 54 year old mother-in-law of Olga, to do the job.

"Moya then said he struck the woman over the head with a borrowed .22 caliber pistol as Baldonado dragged her into the car. They beat and strangled her, finally burying her in a shallow grave in the Casitas Pass area, it was reported.

"Gustafson said he had to remake his plans for the grand jury hearing at the last minute."

By the time that the tape recording was released by petitioner to be played by a local radio station, the district attorney and other law enforcement officers had already been responsible for releasing selected portions of the alleged confession, had already released a great bulk of prejudicial material for publication, the trial judge had denied change of venue, the trial judge was reported as ordering a couple of banks of lights turned on in the courtroom for the benefit of photographers, an early trial date had been set, and petitioner's court appointed counsel had been denied a continuance of trial on grounds of insufficient time to prepare. Petitioner was therefore forced to use some means to attempt to appeal to the same public

which had been prejudiced against him by prior actions of the district attorney and other state officers.

Respondent certainly cannot contend that petitioner's counsel caused this to be done to further prejudice his client's position. Of course, the reported excerpts of the tape recording released to the press by the district attorney did not tell the true story. The tape recorded statement contained emotional outbursts of remorse, sobbing and weeping of petitioner in great contrast to the cold, cruel-sounding version previously released by the district attorney to the press.

Respondent is correct that the Santa Paula Chronicle is the third daily newspaper in Ventura County. This was overlooked by petitioner and for good reason. According to the *Directory of Newspapers and Periodicals*, 1959, N. W. Ayer and Sons, Philadelphia, Pa., the Santa Paula Chronicle was published five days a week with a circulation of 2,807.

Concerning the general character of Ventura County, that is best described in a column appearing in Exhibit 27, Star-Free Press, December 29, 1958, wherein it is called a "cow county."

> "Ventura County played 'host' to a number of visitors last week which it was not geared to accommodate.
>
> "These were members of the press who gathered to dig out facts (and fancy) about the characters in the grisly Olga Kupczyk Duncan murder case.
>
> "At times, there were 30 reporters and cameramen in the Ventura County Courthouse and because the usual quota is four or five, there are no facilities for this number . . .
>
> "The visiting press developed opinions of some of the 'cow county' officials that surprised even themselves.

The metropolitan press men and women are used to dealing with officials who are used to hustle and bustle of big murder trials on almost a daily basis . . .

"For District Attorney Roy A. Gustafson, they held respect for legal capabilities when the week long indictment drama was over. The consensus was that Gustafson took a hold of the dilemma by both horns and, if this be a cow county, he rode it to the finish.

"The visiting press, and the hometown boys as well, felt Deputy Sheriff Ray Higgins was somewhat of a hero in the case . . .

"Someone needed to take charge of the host duties in the courthouse halls and provide the press with some services.

"Clarence 'Clary' Henderson, D.A.'s investigator, assumed the role. He arranged for photographs of the murder suspects. He provided names of the witnesses who had appeared before the Grand Jury . . ."

II.

The Conduct of the District Attorney in Publishing Prejudicial Material Prior to Trial Is Not Only Material But Constitutes a Direct Violation of Due Process by the State.

Respondent contends that the conduct of the district attorney is not in issue. The district attorney himself apparently was of the opinion that his conduct was in issue at an early stage of the proceedings. On January 13, 1959, in hearing on change of venue, he introduced the affidavit of the managing editor of the Ventura County Star-Free Press denying that an alleged statement of the district attorney was published (TR 22-23). The district attorney offered his own affidavit admitting that a particular state-

ment was made and denying that another statement was made by him (TR 24-25). He did not deny making any other statements attributed to him until oral argument before the California Supreme Court when he claimed for the first time that he had been misquoted in one particular respect. The district attorney did not deny making *most* of the statements attributed to him as reported by the opinion of the California Supreme Court but claimed only that he was misquoted in one particular statement.[1]

Respondent then contends that his conduct is not in issue here but the only issue is what effect the published reports

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[1] Transcript of Oral Argument Before California Supreme Court, P. 26 and 27:

(Petitioner is informed and believes that this transcript is being certified to the Court along with request to augment record.)

Mr. Gustafson: I did not ever say anything about seeking the death penalty against any or all of these defendants at any time prior to the time that I addressed the jury.

Why didn't I issue a retraction or demand a retraction when I did see—and I admit I saw—this report of an interview, in the paper, in the Star Free Press? And I had granted an interview, Mr. Justice Peters, and it was with respect to why did I think the death penalty should be retained in California, and it was not with respect to any of these three defendants at all. It was just on the general proposition of the reason for retention of the death penalty.

Mr. Justice Peters: So far as the record is concerned, this is the first denial you have made of that interview, is that correct? Do I understand that from your statement?

Mr. Gustafson: Yes, and I will explain—

Mr. Justice Peters: And we are to ascertain the state of mind of the jurors at the time they were chosen, and pass on this case by your denial now?

Mr. Gustafson: No, because—I would like to explain why there hasn't been one up until this time and why I think it is unimportant in that respect.

Mr. Justice Peters: I think it is highly improper to refer to matters outside of the record.

Mr. Gustafson: I don't think I am referring to any matters outside the record. I think I am explaining why it is immaterial whether there was or wasn't a denial.

had upon prospective jurors. Respondent appears to overlook as the district attorney overlooked through the proceedings that the district attorney is a state official and that he acted in behalf of the State of California. Cases dealing with pre-trial publication of prejudicial material have considered important the source of the published material. *Delaney* v. *U. S.* (C.A. 1st), 199 F. 2d 107; *Shepherd* v. *Florida*, 341 U.S. 50; *Stroble* v. *California*, 343 U.S. 181. The problem is analogous to conduct of the prosecutor in the knowing use of perjured testimony (*Napue* v. *Illinois*, 360 U.S. 264) willful suppression of evidence (*U. S. ex rel. Almeida* v. *Baldi* (C.A. 3), 195 F. 2d 815) and use of brutality or methods which shock the conscience (*Rochin* v. *California*, 342 U.S. 165).

Respondent weakly contends that the highly inflammatory statement headlined "D. A. URGES DEATH TERM IN KILLINGS" was simply a routine statement concerning legislative policy. However, there is no explanation why the district attorney chose to release the "routine" statement to the press the very day that he released in detail the alleged confession of co-defendant Baldonado. The newspaper contains not the slightest mention of any legislative action on the death penalty. The legislature was not then in session and was not scheduled to be in session until after January 1, 1959.

III.

The Pre-Trial Publications Contained Prejudicial Material Which Was Not Brought Out at Trial and Which Would Not Have Been Admissible as Evidence in Trial.

The fundamental harm flowing from pre-trial publicity lies not in the relative truth or falsity of the reported statements. The vice is that pre-trial publicity violates concepts of ordered liberty which are underlying reasons for procedural safeguards. It is contrary in principle to fundamental concepts such as the presumption of innocence, the right to counsel, the right to jury trial, the right to have the truth or falsity of the charges ascertained in a court of law, the right to confront witnesses against him, the right to cross examination, the right to not be made a witness against himself, the right to have evidence against him under oath, the right to opportunity to defend, and the right to all procedural safeguards to insure uniformity of treatment and protection of civil rights.

Concerning the assertion that nothing appeared in the newspapers that was not brought out during trial, petitioner cites the following published material which was not brought out at the trial and which would not have been admissible under the rules of evidence:

In Exhibit 31, Los Angeles Times, December 23, 1958, Los Angeles Police Chief Parker reported that witnesses Mrs. Emma Short and Mrs. Esperanza Esquivel were given lie detector tests, that Mrs. Esquivel disclosed that Mrs. Duncan had asked her to help find someone who would get rid of her daughter-in-law, that she introduced Mrs. Duncan to Moya and Baldonado, that they rented the kidnap car from Mrs. Sarah Contreras, and that Mrs. Short and Mrs. Esquivel have been secreted away at their own

request. Evidence of a lie detector test by a witness is not admissible. *People* v. *Aragon*, 154 C.A. 2d 646, 316 P. 2d 370.

A statement in argument by a district attorney inferring his personal belief concerning the guilt or innocence of a defendant is error. *People* v. *Hidalgo*, 78 C.A. 2d 926, 179 P. 2d 102; *People* v. *Podwys*, 6 C.A. 2d 211, 34 P. 2d 467; *People* v. *Edgar*, 34 C.A. 459, 167 P. 891. Yet, the following was published:

Exhibit 14, Star-Free Press, December 19, 1958:

"'She (Mrs. Elizabeth Duncan) has been through enough annulment proceedings,' Gustafson said, 'to have known that what she obtained here August 7th was not a legal annulment.'"

Exhibit 3, Star-Free Press, December 22, 1958:

"Gustafson said he believed that the motive for the hired killing was jealousy."

Exhibit 16, Star-Free Press, December 23, 1958:

"Gustafson said he discounted the blackmail claim and observed that as far as he was concerned the only reason Moya and Baldonado sought money from Mrs. Duncan was because 'they wanted the pay they were promised for the job they did.'"

Exhibit A-55, Star-Free Press, March 18, 1959:

"District Attorney Roy A. Gustafson said: 'If I didn't believe her guilty, I would n't have prosecuted her.'"

No evidence was admitted concerning any threats or attempts of petitioner or co-defendants to intimidate witnesses. Yet, there was published the following:

Exhibit 9, Star-Free Press, December 29, 1958:

"Gustafson said that he has received reports of written threats received by persons in Santa Barbara who have been questioned about the case. He said threats of bodily injury were made but that he doesn't know whether this was the work of cranks or if the threats came from someone who might be involved in some way in the murder for hire case."

Exhibit 14, Star-Free Press, December 19, 1958:

"Mrs. Short, Gustafson said, has provided important information in the case and expressed her desire to have her whereabouts kept a secret. 'We are assisting her in doing so,' Gustafson said."

Exhibit 16, Star-Free Press, December 23, 1958:

"Gustafson said he is preparing his presentation for the Grand Jury Friday and will call 'maybe a dozen' witnesses. He indicated some of the principals in the case would appear, including Mrs. Duncan, Augustine Baldonado, 25 year old confessed killer of Olga Duncan; Mrs. Esperanza Esquivel, Santa Barbara, who reportedly introduced Baldonado and Luis E. Moya to Mrs. Duncan; Mrs. Emma D. Short, Santa Barbara, who accompanied Mrs. Duncan and Ralph Winterstein to Ventura August 7 to obtain a fake annulment of the Duncan-Kupczyk marriage. Mrs. Esquivel and Mrs. Short both had at their own request been hidden out for the past several days. Gustafson said . . ."

Exhibit A-54, Star-Free Press, March 16, 1959:

"GUSTAFSON EXPLAINS 'BAD LIGHT'

"'In my argument last Friday I used the word "ashamed" with reference to the actions of some judges

and lawyers. I intended to and should have said that I regret, as I am sure they do, that the procedures actually allowed a delay during which the after-events proved Mrs. Duncan was actually conspiring to take the life of her daughter-in-law.'"

It has been held error in federal courts to appeal to patriotism and national emergency. *Viereck* v. *U. S.*, 318 U.S. 236. It is error to urge conviction because of prevalence of crime. *Turk* v. *U. S.* (C.A. 8), 20 F. 2d 129. Yet there was published the following:

Exhibit A-36, Star-Free Press, March 21, 1959:

"MRS. DUNCAN TO DIE

"District Attorney Roy A. Gustafson hailed the verdict and said it should have an effect on heading off moves to abolish the death penalty in California."

Exhibit 3, Star-Free Press, December 22, 1958:

"D. A. URGES DEATH TERM IN KILLINGS" (Pet. Op. Br. 13-14).

Exhibit 8, Star-Free Press, December 30, 1958:

"ROY GUSTAFSON EXPLAINS WHY HE WILL ASK DEATH PENALTY FOR DUNCAN MURDER TRIO" (Pet. Op. Br. 25-27).

Respondent attempts to leave the impression that this case involved only a few out of court statements by the district attorney at the outset of the case. On the contrary, the district attorney pursued a consistent policy of statements to the press. In addition to the more damaging out of court statements of the district attorney cited in petitioner's opening brief, the following occurred:

Exhibit A-41, Star-Free Press, February 21, 1959:

"Gustafson said he will begin his presentation Tuesday with a 'very brief' opening statement. He refused to comment about which witnesses he will present first. He said earlier he has subpoened 'around a hundred' witnesses."

Exhibit A-44, Star-Free Press, February 28, 1959:

"Commenting on Baldonado's statement that he did not plead guilty to first degree murder, Gustafson said both he and Moya who face trials in April 'will be up for the death penalty.'

" 'Had I been willing to stipulate to life imprisonment, there would obviously have been no trials,' Gustafson remarked."

Exhibit A-46, Star-Free Press, March 3, 1959:

"Gustafson told reporters Mrs. Duncan's alleged statements admitting the payments are important to his case even though she ascribes a different reason for them than does the prosecution . . . Gustafson said it is his view that the only possible verdicts in the case are first degree murder or acquittal."

Exhibit A-10, Star-Free Press, March 5, 1959:

"Gustafson explained the presence of court appointed psychiatrists Dr. Louis R. Nash and Philip R. A. May by reminding reporters that Sullivan had forbidden his client to discuss the murder case with them during their psychiatric examination. He indicated they wanted to hear her story about the crime."

Exhibit A-49, Star-Free Press, March 9, 1959:

"DUNCAN LOVE A LIE, SAYS GUSTAFSON.

"District Attorney Roy A. Gustafson said today he will show that Frank Duncan's professions of love for his murdered wife, Olga, are false."

Exhibit A-56, Star-Free Press, March 19, 1959:

"As a result of these and other lies, Gillis testified, he was not allowed to take the examination.

"(Gustafson told reporters later that the bar board now has changed its mind and Gillis will be allowed to take the examination in the near future.)"

Further, the district attorney was mentioned and photographed in practically every week-day issue of daily newspapers circulated in Ventura County throughout the time consumed by the trial of Elizabeth Duncan, which was from February 16, 1959, through March 20, 1959. His courtroom comments were often quoted in newspapers and were extremely damaging to petitioner, such as in the following:

Exhibit A-53, Star-Free Press, March 14, 1959:

"Gustafson said it would be the grossest miscarriage of justice if Mrs. Duncan is acquitted and her hirelings stand convicted 'as they already are.'

"(Moya and Baldonado have withdrawn pleas of not guilty to first degree murder of Olga and face separate trials in April on penalty and sanity.)

"Gustafson told the jury he 'suspects' both will be sentenced to the gas chamber."

IV.

There Is Ample Proof Under the Circumstances That Jurors Were Affected by the Pre-Trial Publicity.

Respondent contends that there is no proof that any of the jurors who served read the news articles or were affected by pre-trial publicity.

First of all, respondent assumes that there was searching voir dire examination permitted. This was not the case. As an example, consider the voir dire examination of prospective juror Conley:

> Q. Did you read in the Oxnard Press Courier about the result in the Augustine Baldonado case?
>
> A. I did.
>
> Q. Did you read that he received the death penalty?
>
> A. Yes, I did.
>
> Q. And did you read the comments that were reported that Judge Blackstock made about complimenting the jury for their courage and intelligence?
>
> A. I did.
>
> Q. Do you know Judge Blackstock?
>
> A. I do not.
>
> Q. You have heard of him though, have you not?
>
> A. Oh, yes.
>
> Q. The fact that you have read such a comment as that influence your decision in this case against Luis Moya?
>
> A. Not at all.
>
> Q. The fact that both Elizabeth Duncan and Augustine Baldonado received the death penalty have any influence on you in this case?
>
> A. No.
>
> Q. Do you have any opinion now as to what penalty (fol. 94) should be imposed upon the defendant.

A. Well, truthfully, I thought I did, but I'm not sure that I really did. I think one should listen to the evidence.

Q. Well, I mean you're not just saying that so that the Judge or somebody won't—

A. No, because I feel there is always a reason for doubt, room for doubt.

The Court: You will decide this case entirely on the evidence that may be adduced in this case itself?

Prospective Juror: That's right.

The Court: And nothing else? Right?

Prospective Juror: Yes, sir.

The Court: Is that right?

Prospective Juror: Yes, sir.

Mr. Henson:

Q. Do you feel that in every case of willful, deliberate and premeditated murder, that the perpetrators should be given the death penalty?

A. Well, if it could be proven beyond a shadow of a doubt.

Q. In other words, in every case where it has been proven that the defendant has committed willful, deliberate and premeditated murder, you would vote for the death penalty, is that right?

A. Well, that is the way I feel now.

The Court: Well, wouldn't it depend upon the evidence (fol. 95) in the case?

Prospective Juror: Yes, that is true.

Mr. Henson:

Q. Well, Mrs. Conley, do you understand that the defendant here has pleaded guilty to willful, deliberate and premeditated murder, and there will be no question about that whatsoever.

A. Well, I just felt that there were things that could come up to prove differently.

The Court: There is only one question to be determined here, that is the penalty to be inflicted.

Prospective Juror: Oh.

The Court: You must inflict one of two penalties, either the death penalty or life imprisonment, one or the other. You have to make up your mind which one.

Prospective Juror: I see.

The Court: And you must predicate your verdict, no matter what it is, on the evidence adduced in this trial, and if you thought there was something in the case that justified your inflicting the death penalty, you do that, and if you thought there was something that justified your giving life imprisonment, you would do that, wouldn't you?

Prospective Juror: Yes, right.

Mr. Henson:

Q. Mrs. Conley, let me get this clear here now. Do you feel that in every case of willful, deliberate and premeditated murder, that the death penalty should be inflicted?

(fol. 96) A. I guess I would say no in that case, because there could be exceptions. I would want, like I say, to decide that.

The Court: You would want to be sure that the evidence showed something that justified life imprisonment, wouldn't you?

Prospective Juror: Yes, your Honor.

The Court: And if it did then, you wouldn't inflict the death penalty, and if it did not you might inflict the death penalty?

Prospective Juror: Yes, sir.

The Court: That's entirely within the discretion of the jury (TR 235-237).

Obviously, the form of questions asked by the trial judge left the prospective juror no choice except to give answers which would qualify her as a trial juror.

Secondly, it cannot be assumed that jurors give truthful answers on voir dire examination. The following are excerpts from several textbooks on trial practice.

TRIAL STRATEGY, *William Scott Stewart,* 1940, The Flood Company, Chicago, at p. 142:

"Don't take the word of the prospective juror that he is not prejudiced and will be fair—often his ideas of fairness are remote from yours."

COURTROOM STRATEGIES, *Ben W. Palmer,* Prentice-Hall, 1959, at p. 158:

"Unless a member of the panel is excluded from service in the particular jury because of some statutory ground, you come to a more difficult problem. The problem is to detect bias or prejudice, hostility to your client or undue friendship with your adversary, if it is not apparent on the face of the situation. If there be be no blood or business relationship, your problem is to detect a bias that is hidden, in fact, in some cases is not even known to the person subject to the bias. For it often happens that a juror has unconscious prejudices, friendships and hostilities . . . of which he is not aware."

P. 160:

"The difficulty with prejudices as we all know is that most men regard their opinions as convictions. They

are ashamed to admit that they have any prejudices—unless they are seeking to escape jury duty."

PLANNING AND TRYING CASES, *Charles W. Fricke*, West Publishing Co., 1957, at p. 124:

"If the case is one which has had some notoriety, it should be anticipated that one or more of the jurors has read about it in the public print or has discussed or heard discussed the facts or purported facts. The answers which such a juror may give on voir dire may be influenced by his desires to serve as a juror in the case, or a desire to avoid that service.

"It is not surprising to the experienced courtroom habitue how many jurors, in a case which has received much mention in the public press, have either 'read only the headlines' or 'formed no opinion' from what they read or heard discussed. Human curiosity and interest in sensations is so natural that one doubts an answer to the effect that only the headlines were read, and, if we take at its face value, an answer that the juror formed no opinion when he read or heard discussed the purported facts of the case, we can only conclude that the juror either lacks in normal intelligence or that he has intended by his answer that he formed no such opinion as would have any influence upon his verdict should he be accepted as a juror."

P. 95:

"It is natural that jurors generally would like to avoid trying cases in which the testimony is likely to be disgusting and obscene and to have a distinct desire to serve on cases that are sensational or otherwise interesting to them, and, while it should not be so,

these inclinations and desires not infrequently affect the answers given by them while under voir dire examination. This is sometimes quite evident when a juror, having observed that certain answers to questions, put to previously examined jurors, have resulted in their being excused or challenged, adopted similar answers for his replies or, if he is desirous of getting in the case, avoids making such answers."

Voir dire examination in petitioner's case presented other practical problems. To examine a prospective juror in great detail concerning a specific news report would mean informing the rest of the prospective jurors as to the contents of the news report. The repetition of detailed examination of a juror concerning news publications would simply increase the effect of the publications upon the other prospective jurors present.

V.

Petitioner Made His Position Clear That He Could Not Be Afforded a Fair and Impartial Trial in Ventura County.

Respondent contends that petitioner waived objection to jurors by failing to challenge those with opinions and that petitioner waived objection to venue by failure to make further motion for change of venue following voir dire examination.

Petitioner at the time of trial was well aware of Judge Blackstock's rulings on challenges to jurors in the Elizabeth Duncan trial. Reference is made in this respect to the Transcript of Record in *Duncan* v. *California*, October Term, 1960, No. 187, and to the brief of petitioner Elizabeth Duncan. Petitioner had no reason to believe that Judge

Blackstock would depart in any way from his previous rulings on challenges in the Elizabeth Duncan case.

To challenge a juror knowing that the challenge will be disallowed would be an idle act. Such action would be extremely likely to alienate not only the challenged juror, but the rest of the panel as well. This practical consideration is well recognized. See SUCCESSFUL JURY TRIALS, *Appleman*, 1952, at p. 133:

> "In exercising a challenge, it is to be borne in mind that the juror challenged may be personally affronted. The affront to him is not of immediate or direct importance, [note: author is assuming that challenge is allowed] except that it may be reflected in the feelings of the jurors who remain."

As for the failure of petitioner to make further motion for change of venue after voir dire, this would have been an equally idle act and would likely have been construed as an affront. Judge Blackstock had denied two prior motions for change of venue with the comment that he had "absolute confidence" in the people of Ventura County. Further, Judge Blackstock left the impression by prior published comments that a change of venue would reflect upon the integrity, decency and humanity of the people of Ventura County. Still further, Judge Blackstock had denied the motion of co-defendant Duncan for change of venue following voir dire examination. Again, petitioner had no reason to believe that Judge Blackstock would remove from an announced and entrenched position.

Failure to move for change of venue is important in a case such as *People* v. *Cook*, 39 C. 2d 496, 247 P. 2d 567, wherein defendant did not exhaust his peremptory challenges and announced that he was satisfied with the jury. Failure to move for change of venue until three years after

trial was considered important in *U. S.* v. *Handy*, 351 U.S. 454, when coupled with failure to exhaust peremptory challenges. Essentially, the same was true in *Stroble* v. *California*, 343 U.S. 181. However, it must be noted that the failure to move for change of venue was not considered in the above cases as some technical requirement but rather as a significant indication of merit or lack of merit. In petitioner's case, the venue question was put in issue shortly after arraignment and again shortly before trial. Failure to make further motion for change of venue was dictated by practical considerations discussed.

Conclusion

Petitioner has demonstrated that the State of California through the district attorney and other officers influenced his trial; that the pre-trial publicity was actively promoted by the district attorney; that the pre-trial publicity was inflammatory and prejudicial; that there was ample opportunity for jurors to be affected; that it was likely that jurors were affected; that some jurors in all likelihood were affected; that the trial judge encouraged the pre-trial publicity; that the trial judge contributed to community hostility; that the question is life or death and great scrutiny is warranted; and that due process was violated.

It is respectfully submitted that the judgment below be reversed and the cause remanded for retrial on the issue

of penalty in a county in California other than Ventura County.

Respectfully submitted,

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